

# AMERICAN BAR ASSOCIATION JOURNAL

JULY, 1931

**Supreme Court Honors Memory  
of Taft and Sanford**

**Corporate Fiduciaries and  
Legal Ethics**

By HON. GEORGE A. SLATER

**Aircraft Liability to Persons and  
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**Independence of the Permanent  
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**Old Age Pension Legislation**

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**Review of Recent Supreme  
Court Decisions**

By EDGAR BRONSON TOLMAN

**The Rise and Fall of Constitu-  
tional Doctrine**

By E. F. ALBERTSWORTH

VOL. XVII

No. 7

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NO. 7



## *Governor Bryan of Nebraska Vetoes Bill to Require Written Opinions*

THE Nebraska Legislature exceeded its constitutional authority in passing a recent measure to require the Supreme Court of the State to hand down written opinions, according to Governor Charles W. Bryan, who promptly vetoed the bill. His message to the Legislature was as follows:

To the Members of the House of Representatives of the 47th Session of the Legislature of Nebraska:

Ladies and Gentlemen:

I return herewith House Roll No. 311 without my approval. For two reasons, I do not feel that I should sign this bill and in my judgment either one of the reasons would be sufficient.

First, the legislature undertakes to require the Supreme Court to write opinions in practically all cases and even on motions and to report, that is, publish in the reports all opinions. I do not believe that the legislature has constitutional authority to require this.

Article 2, Section 1 of the Constitution of this State gives the three coordinate powers, legislative, judicial and executive, and says that neither shall infringe on the other, "except as hereinafter expressly directed or permitted." Article 5, Section 2 of the Constitution requires the Supreme Court "to pronounce a decision" but it nowhere speaks of writing "opinions." The Court speaks by its *judgments*. They are entered on the journal and go down to the district court in the form of mandates. A written opinion is the usual, but not required way of stating the reasons for the actual judgments. It is the latter that controls.

Section 27-208, Compiled Statutes of Nebraska for 1929, which House Roll No. 311 undertakes to

amend, had a better reason for its existence because it suggested reporting decisions (not opinions) when they reversed or modified the judgments of the district court—not when they affirmed the lower court or tribunal.

The second reason for withholding my approval of House Roll No. 311 is that if the legislature did have a constitutional right to require the Supreme Court to write opinions and to report or publish them in all cases, it would add greatly to the expense. If the members of the Court were compelled to prepare and report an opinion in each case it would require so much additional time that the docket would again become clogged. The Supreme Court recently requested that the Supreme Court Commission be discontinued after September 15th. If the judges were required to prepare opinions in practically all cases heard by them it would, no doubt, be necessary to continue the Supreme Court Commission indefinitely, thereby greatly increasing appropriations and hence increasing the tax levy on the tax payers of this state.

Both to protect the constitutional rights of the three coordinate powers of government and to prevent the cost of justice from becoming out of the financial reach of the people of our great state, I do not feel that I should give my approval to House Roll No. 311.

Very respectfully submitted,  
CHARLES W. BRYAN,  
Governor.

April 21, 1931.

## *California Judicial Council Makes Third Report*

THE recommendations contained in the Third Report of the Judicial Council of California, just received, "relate to simplifying and improving the administration of justice by changing the existing

laws on practice and procedure." They are thus summarized in the report:

"A change to make the summary judgment procedure of the municipal courts applicable also to superior courts, permitting entry of judgment, without trial, for money demands to which no meritorious defense is shown by answer or affidavit, and another change in the present municipal court provisions to completely conform the provisions.

"Measures providing for admissions and disclosures of facts in advance of trial to save time of the judges, jurors and disinterested witnesses, as well as the litigants and their attorneys; also for admissions of authenticity of written instruments and abstracts of public records, and avoiding the necessity of formal proof thereof.

"A requirement for submission to the trial court and full disclosure on motion for new trial, of all claimed errors which might be urged on appeal, so as to enable that court to correct the same without delay and avoid the likelihood of reversal, after months of waiting, by reason of vital matters which the trial judge might have corrected.

"An amendment to the sections relating to change of place of trial to permit full presentation upon the original motion of all matters bearing thereon, including the convenience of witnesses, as well as residences of the parties, thus avoiding buffeting from court to court of the litigants, with the incidental delay and expense.

"Changes in the provisions relating to appeals to the superior court and the appellate departments of the superior court. These proposals grow out of the experience of the judges of the appellate departments of the superior court and would simplify the preparation of records on appeal, reduce the cost thereof, and enable the reviewing court more fully to do justice between the parties and render final judgment in cases on appeal.

"A provision that a new trial may be granted to relieve an appellant who is unable to secure a transcript of testimony because of absence, incapacity or death of shorthand reporter."

#### **"Congestion of Judicial Business"**

Under the head of "Congestion of Judicial Business" the report states that "notwithstanding the adoption of the measures submitted by the Council to the Legislature increasing the jurisdiction of municipal and justices' courts and the mobilization of judges for the purposes noted, the congestion in courts has not been adequately relieved." The judicial mobilization referred to has been interfered with by a reduction in the number of judges available for assignment. "Among the causes for this," the report continues, "is the reduction of \$10,000 in the requested appropriation for these purposes, and, in addition, the diversion of \$24,000 from the appropriation actually made, said last mentioned amount being diverted by the act creating the Fourth District Court of Appeal to defray, in part, the cost of maintaining that tribunal. Campaigns for reelection and sickness also contributed to a reduction in the number of judges available. The principal factor, however, was the discontinuance, in great measure, of the assignment of municipal court judges to the superior court in Los Angeles County and filling temporary vacan-

cies thus created in the municipal courts by assigning thereto justices of the peace and judges of various city courts of inferior jurisdiction.

"During 1927 and 1928, the number of cases awaiting trial in the Los Angeles superior court was so greatly reduced by utilizing the judicial man-power above referred to, that trial could be had within approximately ninety days from the filing of notice to set for trial as compared with fourteen to eighteen months at the beginning of 1927. Criticism of the utilization of the judges of these inferior courts arose from various sources, and ultimately a resolution was transmitted to the Council by the trustees of the Los Angeles Bar Association objecting to the procedure, and requesting its termination. There seemed reason to believe that the resolution reflected the attitude of a number of the judges of the superior court, as well as active members of the Bar, and the request was therefore complied with. Such assignments from inferior courts to the superior court as have since been made were necessary to meet emergencies and situations which could not have been cared for otherwise. The time between application to set and trial date has now increased to approximately thirteen months."

#### **Opportunity for Extensive Research Program**

Under the head of "Allotment for Research" the council recommends a legislative appropriation of \$6,000 per year for purposes of research. "As shown by our previous reports," the report says, "the research work of the Council has been carried on, for the greater part, by Hon. Harry A. Hollzer, judge of the Superior Court of Los Angeles County. He cannot continue to devote his time to the work . . . and even were he to continue to as a judge of the Superior Court of Los Angeles, the increasingly large volume of litigation in the county requires the full time of all the regularly constituted judges of that court, as well as all other judges available for assignment thereto." It continues:

"An opportunity is now offered, through co-operation with the State Bar of California, the Bureau of Public Administration and the School of Jurisprudence of the University of California, for a joint arrangement by which provision can be made for a very extensive program of research into the various problems relating to the administration of justice in California, to be conducted at the University of California, Stanford University, and the University of Southern California. By uniting with these agencies and securing a competent Director of Research, the Judicial Council will be in position to obtain equal, or better, results than it could if conducting its individual line of research, and at considerably less expense to the State."

Part two of the Report contains elaborate statistics and a detailed report of the judicial business of the state, together with a summary of research studies of judicial administration, practice and procedure. This was prepared and submitted by Judge Hollzer, the Research Director of the Judicial Council. This material is too exhaustive for digest here, but there are certain features which are of special interest and may be noted. For instance, Judge Hollzer notes certain "improvements in the trial of criminal cases," largely as a result of the adoption

in 1928 of a constitutional amendment permitting the waiver of a jury in felony cases. He says:

#### Results of Permitting Waiver of Jury in Felony Trial

"As a result of the adoption in November, 1928, of the constitutional amendment permitting the waiver of a jury in a felony trial, we find that, beginning with 1929, many of these cases have been tried before the court, sitting without a jury. During the fiscal year ending June 30, 1929, out of a total of 867 contested criminal trials, 241, or slightly more than 27 per cent, were heard without a jury. In the following year, this ratio had increased quite considerably, with the result that approximately 44 per cent of all the defendants tried waived a jury.

"Perhaps the most important advantage gained by this change in procedure has been the very substantial increase in the volume of contested criminal cases tried, without adding to the number of judges hearing the same.

"This improvement is best illustrated by comparing the business disposed of by the criminal departments of the Los Angeles Superior Court during the year ending June 30, 1928, with the results obtained two years later. Omitting, for the purpose of this discussion, the master calendar department of the criminal division—no contested trials are heard there—8½ departments during the first year mentioned tried a total of 1071 contested cases. The latter resulted in 646 convictions, 305 acquittals, and 120 jury disagreements. Of course, all of these trials were had before juries.

"On the other hand, in the last fiscal year, 8 departments disposed of approximately an equal volume of business. The report for that year showed 357 convictions and 167 acquittals by juries, while there were 295 convictions and 181 acquittals by the court sitting without a jury.

"It is likewise important to note that the number of cases in which juries are waived is steadily increasing. In the year ending June 30, 1929, during only about half of which period such waiver was permissible, approximately 27 per cent of the cases were tried before the court without a jury. In the following year, however, this proportion advanced to nearly 44 per cent. Furthermore, we have been advised that, by the close of the calendar year 1930, this percentage had risen to nearly 50 per cent.

"It is also of interest to note that in the year ending June 30, 1930, out of a total of 607 defendants tried before juries, slightly over 27 per cent were acquitted, about 57 per cent were convicted, while the jury failed to agree as to the remainder. During the same year, of those tried before the court sitting without a jury 38 per cent were acquitted and 62 per cent convicted.

"When we recall that many of those opposing the adoption of this constitutional amendment charged that the measure was a scheme to trap unwary defendants and entice them to waive a jury trial, in order that they might be railroaded to jail, and remembering also how these opponents ridiculed the proposed change, insisting that, even if adopted, it would prove useless because practically

all defendants would insist upon a jury trial, the results above described become quite significant."

#### Results of Improved Appellate Practice Elsewhere

Under the head, "Revision of Appellate Practice Necessary" the Research Director suggests that the congestion in the Appellate Courts may be eliminated without increased cost by adopting methods which are in successful operation in other jurisdictions," notably in New York and in the Federal Jurisdiction. In this connection he restates observations made in a previous report on the United States Supreme Court and the appellate tribunals of the State of New York, and adds:

"As pointed out by Chief Justice Cardozo of New York, and likewise by Presiding Justice Dowling of the Appellate Division, the State which is not only first in population and in wealth, but which is burdened with the largest volume of judicial business, has solved the problem of congestion and delay in appellate tribunals, without multiplying courts and adding judges, but, on the contrary, by adopting methods which are exceptionally economical.

"At present, the seven justices of the New York Court of Appeals, plus the seven justices of the Appellate Division, First Department of that state, fourteen in all, are disposing of more proceedings annually than the 25 justices who comprise the membership of our Supreme Court and District Courts of Appeal combined, because in the first mentioned state its judges are permitted to work under the most improved methods of appellate practice, while our judges are handicapped by restrictions which greatly reduce the volume of business they can dispatch, thereby resulting in congestion in our appellate tribunals, and causing serious delay in the decision of appeals.

"The extraordinary results achieved by the appellate tribunals of New York demonstrate most convincingly that the appellate practice of that state is far superior to our own, and that by adopting the same, we shall be able to eliminate the congestion in our appellate tribunals, and dispose of our appellate business expeditiously, without adding to our courts or multiplying the number of judges, or otherwise increasing our judicial expenditures.

"Why should not California establish the principle—to quote the late Chief Justice Taft—that where there is a trial court and one appellate court, the litigants, so far as doing justice to them is concerned, should be satisfied with the decision of the appellate court, and, that that decision should be brought to the Supreme Court only when the principle to be settled by the Supreme Court will be useful to the public in settling general law?"

"Why should we not adopt the plan—to borrow the language of Chief Justice Cardozo, of 'restricting rather narrowly the cases appealable as of right' to our court of last resort?"

"Why should we not recognize, as pointed out by Presiding Justice Dowling, 'that the administration of justice is best served by writing opinions only in such cases as involve a reversal or modification or the discussion of constitutional questions, or those of general public interest?'"

The Judicial Council pays the following tribute to its retiring Research Director in Part I of the

report: "It is a matter of congratulation to the State of California and its Judicial Council that the outstanding and self-sacrificing service which Judge Hollzer has given to the cause of improvement in judicial procedure in California has been recognized nationally by his election to the chairmanship of the National Conference of Judicial Councils. His more recent selection as a judge of the Federal District Court, Southern District of California, while a cause for congratulation to him, will rob the Council of one of its most valuable members."

### *Chicago Bar Protests Against Two of Association's Canons of Ethics*

THE Chicago Bar Association has presented an address to the American Bar Association stating that it is unable to adopt a portion of Supplemental Canons of Professional Ethics Nos. 34 and 35, dealing with division of fees and intermediaries, as adopted by the latter Association at the Seattle meeting. It gives the reasons for its attitude and declares that it feels it a duty to make an effort to secure what it believes to be important changes. The action was taken by the Board of Managers after an extended hearing by the Chicago Bar Association's Committee on Professional Ethics. The address has been referred by the Executive Committee of the American Bar Association to the Committee on Supplements to Canons of Professional Ethics for consideration and report.

The April issue of the Chicago Bar Association Record, official organ of that organization, contains

the text of this interesting and significant document. Objection is made to the following sentence in Canon 34, on division of fees: "But the established custom of sharing commissions at a commonly accepted rate, upon collections of commercial claims between forwarder and receiver, though one be a lawyer and the other not (being a compensation for valuable services rendered by each), is not condemned hereby, where it is not prohibited by statute." The reasons for the objection are thus stated:

#### **Objections to Canon 34**

"The fee which a lawyer is entitled to charge for collecting an account is that which the law or custom has established as a reasonable fee, and is measured by the value of the services which he himself renders. If he pays, rebates or allows a portion of that fee to a lay agency placing the account in his hands, he thereby compensates the lay agency for soliciting the account and retaining him to collect it, and makes it profitable for the lay agency, which cannot be restrained by the canons of legal ethics, to engage in the soliciting of accounts. Such division of fees therefore makes a lawyer a party to and a beneficiary of the solicitation. Especially is this true where the lawyer and the agency enter into an agreement to operate in this manner, and, if the practice itself is sanctioned, it would be difficult to restrain the making of an agreement to do that which in itself is not prohibited."

"In this respect no distinction can be made between so-called commissions based upon the amount

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collected and fees for legal services. Such collections are placed in the hands of lawyers because, as lawyers, they are in a position to take such legal measures as are necessary to enforce payment. They are not retained to render services as laymen prior to suit, for which a commission is chargeable, and as lawyers thereafter, for which a fee is chargeable. The retainer is of the lawyer, as such, to make the collection, which constitutes practicing law, and for his entire services a fee and not a commission is his compensation. Again, it would be impossible, where the collection is made by means of a law suit, to regard a portion of the fee as a so-called commission, supposed to be due for and based upon the amount of the collection, as such, as distinguished from the legal services, and to consider the balance thereof as the fee for legal services, for the entire collection would be the result of the legal services alone.

"In brief, we cannot bring ourselves to recognize any distinction between 'commissions' and 'fees' for legal services in the collection of so-called commercial accounts, and cannot sanction a division of commissions or fees between a lawyer and a commercial or collection agency to induce such lay agency to forward commercial collections or other legal business to the lawyer."

#### "Intermediaries" Canon Criticized

The paragraph in Canon 35, dealing with intermediaries, which states that "the established custom of receiving commercial collections through a lay agency is not condemned hereby," is likewise objected to and the reasons therefore stated as follows:

"No reason is perceived why the confidential relationship between lawyer and client, or the duties of a lawyer to his client, should be relaxed in the handling of commercial accounts. Clients should be permitted in all cases to select their lawyer from considerations of trust and confidence, and should not be subjected to the influence of solicitation by lay agencies, which are not restrained by the canons of legal ethics, or to the risk that the lawyer might act in the interest of the agency by which he was selected, rather than in the interest of the client. Nor should a lawyer permit himself to be placed in such a position. There is no more reason why lay agencies should solicit this branch of the client's legal business and make the selection of lawyers to handle it, than with other legal matters.

"We further submit, that, without the co-operation of lawyers in the practices hereby condemned, lay agencies will not find it profitable to continue the practice of soliciting commercial accounts as it is at present carried on.

"As is stated in Canon 27, the most worthy and effective advertisement possible is the establishment of a well merited reputation for professional capacity and fidelity to trust.

"We believe it is the duty of the legal profession to save inviolate the fundamental rule that only qualified and duly licensed attorneys, subject to regulation by the courts and the Bar, shall be permitted to practice law. We look with disfavor upon the growing tendency of lay agencies, individual and corporate, to usurp the functions of the lawyer in rendering service for compensation or commissions by the use of legal formulas to create legal

rights and obligations, by giving legal advice or rendering legal opinions and by the employment of legal remedies. We believe that without the employment, assistance and encouragement of skilled lawyers, lay agencies cannot encroach upon the field of the legal profession and we condemn any alliance between the Bar and lay agencies to that end."

#### The Lawyer in Public Office

The Chicago Bar Association has adopted an additional canon on "The Lawyer in Public Office," which the Bar will doubtless find of interest, in view of the large number of lawyers who are always to be found in public positions:

"When a lawyer is elected to the legislature, or to an executive or other public office of any kind, or holds any public employment, by election or appointment, his duty as the holder of such office or employment requires him to represent the public with undivided fidelity. His obligation as a lawyer (with which we are here concerned) continues; as an example, it is improper for him, as for any other lawyer, to represent conflicting interests, and therefore it is improper for him to act professionally for any person or corporation, including a municipal corporation, or for any other private or public body which is actively or specially interested in the promotion or defeat of legislative or other matters proposed or pending before the public body of which he is a member or by which he is employed, or before him as the holder of a public office or employment. The principle is not that these interests do necessarily conflict, but that they may conflict; no lawyer (says the court), having duties to perform of a fiduciary nature, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. There are other applications of the code of legal ethics to the special case of a lawyer in public office, but it is unnecessary to detail them. These are over and above the duties which are not peculiar to lawyers, but which apply equally to laymen in public office; such as the duty to preserve the legislative branch free and independent of control by the executive, an independence which can scarcely be maintained if a considerable number of members of the legislature are in receipt of salaries from employment in the gift of public offices or boards, local, state, or federal; for it is to them that the member may feel responsible for his conduct in office, and he may look to them for direction and advancement, passing over the public, the true and ultimate source of his authority. These are considerations which the lawyer in public office, above all men, should have at heart; and in failing to observe them he is recreant not only as one in public office or employment, but also to his professional obligations as a lawyer."

#### Corporate Fiduciaries and Their Lawyers

A JOINT announcement of the New York County Lawyers' Association and the Bar Association of the City of New York on the subject of corporate fiduciaries and their lawyers was made on May 11, 1931. A recent report of the first named association's Committee on Unlawful Practice of the Law, of which Mr. Julius Henry Cohen

is chairman, gives the text of that announcement and makes certain additional observations, as follows:

"After two years of co-operative endeavor, in which your Committee and the Committee on Professional Ethics of this Association joined with the Committee on Unlawful Practice of the Law and the Committee on Professional Ethics of the Association of the Bar, a joint statement was approved by the four Committees and was submitted to the governing bodies of the two Associations. This joint statement received the very careful consideration of the Board of Directors of this Association and on December 10, 1930, the Board of Directors approved, substantially without change, the declaration of these four Committees, dealing with the ethical standards which should control the action of lawyers in connection with their relation with fiduciaries. The Board of Directors of this Association deemed it prudent to separate this declaration from the other phase of the joint statement of the Committees, which related to the possibility of self-regulation of fiduciaries.

"A difference of viewpoint was disclosed between this Association and the governing body of the Association of the Bar, and in an effort to reconcile the views of the Associations, a Special Committee of the Board of Directors of this Association met with a Special Committee of the Executive Committee of the Association of the Bar.

"These special Committees succeeded in formulating a statement of the principles recommended in substance by the four standing Committees and an agreement was reached that this joint declaration should be released for publication on Monday, May 11, 1931.

#### Joint Statement of Bar Associations

"This statement appeared in the New York Law Journal on May 12, 1931, and says:

"Persons contemplating the making of a will or the establishment of a trust should be fully advised by their own counsel before decision on matters such as (a) whether a trust should be created at all, (b) what should be its duration, (c) whether it should be revocable or irrevocable, (d) what qualifications are desirable for executor or trustee, (e) how many fiduciaries should be named, and (f) what should be the powers, immunities and compensation of any such fiduciary.

"Decisions on all of these points are of serious importance and in many cases irrevocable; and the desires of a prospective fiduciary may frequently conflict with the best interests of the testator or creator of the trust or of the beneficiaries thereof.

"There should be no divided allegiance upon the part of the lawyer drawing or advising with respect to a will or trust agreement.

"In the judgment of the Associations a lawyer should not advise a prospective testator or donor as to the making of a will or trust if the lawyer already occupies a relationship to a proposed or potential fiduciary which might embarrass him in advising fully and freely as to all matters involved in the formation and terms of such trust. Such embarrassment exists where the prospective testator or creator of the trust has come to the attorney at

the instance of any person or institution seeking to be named as fiduciary.

"Moreover, if an attorney habitually obtains clients as a result of solicitation of fiduciary relationships by a corporate fiduciary, and such solicitation is known to the attorney, he is acquiescing in the indirect procurement of professional employment and taking the benefits thereof.

"The Associations recognize as an exception to the foregoing principles, that past relations of trust and confidence may result in an attorney being peculiarly qualified, and consequently under a duty, to advise a client in regard to his will or a contemplated trust. In such case he may do so, irrespective of relations with the prospective fiduciary, if after full disclosure the client so requests.

"Lawyers should refrain from assisting in or encouraging the distribution to laymen of form wills or trust indentures or similar documents, and should endeavor to stop the practice, because of the danger in the use of such documents without the revisions and corrections that are necessary to meet the needs and intentions of the individual client under advice of his own counsel."

"Your Committee feels that this statement is admirable and is the most forward-looking statement made in this field. It should prove very valuable to the Special Committee of the American Bar Association, which is now dealing with this subject. To the members of the Bar of New York City who have heretofore been concerned respecting the principles of conduct applicable to lawyers in the drafting of wills and trust indentures, this declaration should furnish a clear guide.

#### The Principle of "No Divided Allegiance"

"There can be no difference in principle in respect to the fiduciary obligation of a lawyer, no matter what his standing may be in the profession and no matter what class of work he does. The rule of fidelity is the same. The principle that no lawyer may have a divided allegiance is precisely the same. The prohibition against accepting the benefit, directly or indirectly, of solicitation, is exactly the same. The need of the client for independent advice when drawing so important a document as his will or a trust indenture has been pointed out many times.

"A Special Committee of the St. Louis Bar Association dealt elaborately with this subject in a report to its Executive Committee, made by Mr. Edward J. McCullen on February 4, 1929. After paying tribute to the leadership of the New York County Lawyers' Association and to its Committee on Unlawful Practice of the Law, the Executive Committee said on January 13, 1930:

"Common sense, common knowledge of human nature, and common experience all teach us the eternal truth of the utterance on the Mount, that 'no man can serve two masters.' That is what trust company lawyers are vainly trying to do when they draw wills for and give legal advice to the customers of their companies."

"The same subject matter was dealt with in Opinion No. 10 of the Committee on Professional Ethics and Grievances of the American Bar Association. This Committee said:

"As an employee his only duty is to his employer. As a lawyer he owes a duty to the Court and to the public, as well as to his client. Can he consistently act in these dual capacities

at one and the same time? Being dependent on his employer's pleasure for his livelihood, can he properly observe that independence of judgment and action that are indispensable to the advocate in court? May there not be a conflict between his duty to his employer as an employee and the professional duty which he may owe to the Court and to the profession? However, it is unnecessary to further pursue this thought, as, in the question presented, the attorney's employer is acting in a fiduciary capacity and the matter, therefore, assumes an entirely different character. In that event the attorney's employer, the trust company, is only the nominal client, the actual interests which the attorney is engaged to protect being those of the trust estate. Such a separate interest can only be properly represented by an attorney who, in his professional conduct of the case, is under no obligation to another such as that which must exist between master and servant. He must be free to exercise his independent judgment as an attorney for the benefit of the interests he represents, which he could not be expected to do while under the domination of a third party as its salaried servant.

"The answer of the American Bar Association Committee was approved by the American Bar Association at its Chicago meeting.

"While this opinion deals with the matter of salaried counsel for trust companies or a salaried lawyer-trust officer, we can see no distinction in principle between general counsel who has his office in an adjoining room or suite or even on another floor, and that of a lawyer who is in the regular salaried employ of the trust company. Both owe the duty of fealty and allegiance to the trust company. . . .

#### No Agreement Arrived At

"While the two Associations were engaged in the task of coming to a joint announcement concerning the duties of lawyers in this field, the corporate fiduciaries deemed it in their interest to announce on May 11, 1931 (at the same time the joint announcement was issued by the two Bar Associations), a proposal to co-operate with the Bar, which, unfortunately, was so phrased as to give the impression to the public that a bargain or deal had been made. Of course, this was not the fact. The proposed announcement does not conform to the statement of ethical principles adopted by the Bar Associations for the guidance of lawyers; is definitely limited in scope; in some aspects is in contradiction of the pronouncement of the Bar Associations and undertakes to create a mixed tribunal of laymen and lawyers to pass upon the ethical conduct of lawyers and to displace the four standing Committees of the Associations which have, for years, functioned in that field. We know of no reason for the supplanting of these four Committees by any special committee.

"The subject matter of contact with fiduciaries and the form that such contact will take, we are advised is still under consideration by the Board of Directors of this Association and of the Executive Committee of the Association of the Bar. From this recital of the facts it will appear that there is no justification for any belief on the part of the public that any agreement has been arrived at between the two Associations and the corporate fiduciaries."

#### Massachusetts House Kills Bill Relating to Unauthorized Practice

THE bill relating to the unauthorized practice of law, after receiving a close vote of approval in the Massachusetts Senate, was killed in the House

of Representatives, according to the June issue of the Bar Bulletin, issued by the Bar Association of the City of Boston. The result, we are told, was not unexpected, nor is it regarded as an unalloyed misfortune by the editor of the Bulletin, who expresses the opinion that the prevention of the unlawful practice of the law is a matter that is best left to the Bar and the courts.

"In the first place," he says, "it is difficult, if not impossible, to draft a bill which will restrict the practice of law to those properly qualified and at the same time not interfere with the legitimate activities of those outside the profession. Again, a statute is necessarily rigid, and cannot be readily adapted by the courts to fit each individual case. Furthermore, when the legislature has once undertaken to act upon a subject, the courts are naturally reluctant to go outside or beyond the statute. They incline, and properly so, to restrict themselves to the provisions set forth by the legislature, and therefore may not feel entirely free to break into new ground."

#### A Ruling of the General Council of the Bar of England

IN view of the English division of the profession into barristers and solicitors a question has arisen as to whether an American lawyer may deal with a barrister without a resort to the offices of a solicitor. At a meeting of the General Council of the Bar, held in London on May 18, it was decided that "the Council sees no objection to a lawyer in the United States of America asking an opinion in any matter, or giving instructions in non-contentious matters to an English Barrister without the intervention of an English solicitor." E. A. Godson Esq., Secretary of the General Council of the Bar, who was good enough to send the above information, adds the comment that "the above may be of interest to American lawyers. Its purport is that apart from actual litigation the American lawyer may approach an English Barrister direct."

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## SUPREME COURT BENCH AND BAR HONOR MEMORY OF TAFT AND SANFORD

Attorney General Mitchell Presents Resolutions Adopted by Bar and Pays Appropriate Tribute to the Deceased Jurists—Chief Justice Hughes for the Court Makes Memorable Reply—"We Continue Our Task, Heartened by the Exemplars of Our Faith, Among Whom No One Has a More Inspiring or Abiding Influence Than That of the Late Chief Justice"—Justice Sanford "Met Every Responsibility with Integrity of Motive and Singleness of Purpose and Discharged Every Trust with Complete Fidelity"

MEMORIAL exercises in honor of the late Chief Justice William Howard Taft and the late Justice Edward Terry Sanford were held before the Supreme Court at Washington on Monday, June 1. The resolutions adopted at a recent meeting of the Supreme Court Bar on the life and services of both of the deceased jurists were presented by Attorney General Mitchell, and Chief Justice Hughes replied for the Court. The estimates of the men so honored, brief as they were, are of permanent value and general interest to the Bar and are herewith reproduced in full. In presenting the resolutions on the late Chief Justice Taft the Attorney General spoke as follows:

MAY IT PLEASE THE COURT: During the December recess of this Court members of its Bar assembled here to express their profound regret at the death of William Howard Taft, tenth Chief Justice of the United States, and to make a permanent record of their high regard for his devoted public service. That gathering included many men, themselves distinguished for such service, life-long friends of the late Chief Justice, who paid eloquent and loving tribute to his memory. A minute was prepared, reviewing the principal events of his career, and the following resolutions were adopted:

"It is now resolved that the Bar of the Supreme Court of the United States do hereby record their high appreciation of the long record of devoted and effective service rendered by William Howard Taft to the people of the United States in the many public employments to which he was called, and especially in the exalted office of Chief Justice of the United States. Further resolved, that the Attorney General be asked to present these resolutions to the Court and to request that they be inscribed upon its permanent records and that the Chairman of this meeting be requested to transmit a copy of the resolutions to the family of the late Chief Justice together with the assurance of the sincere sympathy of the Bar in the great and irremediable loss they have sustained."

In obedience to those resolutions I am here to present them, and ask that they be entered in the records of the Court.

Chief Justice Taft was my good friend and I am grateful for the tradition which gives to the office I hold the high privilege of representing the Bar on this occasion.

The only man to hold the two greatest offices in the gift of the American people, he had a public career unparalleled in its variety, with great distinction as a teacher, colonial administrator and executive, but it is appropriate in memorial exercises by the members of the profession which he loved, and for the archives of

this Court, that we speak chiefly of his service to the Court and to the cause of justice, and first of that part of his work recorded in the official reports.

While he was Chief Justice, the Court delivered fifteen hundred and ninety-six opinions. One-ninth of that number is one hundred and seventy-seven. He delivered two hundred and fifty-three opinions for the Court, or one-sixth of the total. The nature of the cases and the labor required in each would have to be examined to judge accurately of his relative efforts, but certainly he did his share.

This is not the occasion to review his judicial opinions at length but a study of them reveals these things. His public life and experience as an administrator and executive had developed a wisdom and common sense which are disclosed in these writings. His opinions are of the kind which are useful to lawyers. They not only decided the cases presented but they are charts for the future. The style is simple and direct, and he never clouded his thought by self-consciousness in expression. His judgments disclose prodigious energy expended in study and research.

In assigning cases to members of the Court for preparation of opinions he gave to himself at least an equal share of those dull ones which were interspersed with the important matters before the Court. He seemed to take a special interest in patent and trademark cases. He had an unusual facility in that field and wrote many fine opinions in important patent litigation. It is in constitutional law that his greatest judicial work was done. Of his two hundred and fifty-three opinions seventy dealt with important constitutional questions. That in the Myers case, settling a controversy as old as the Union, respecting the President's exclusive power of removing executive officers, alone would mark him a great constitutional lawyer. The opinions he delivered from the bench, together with two hundred and four others rendered during his service as a United States Circuit Judge, form an enduring monument to his high judicial qualities.

Standing out beyond his performance of the routine tasks of a Chief Justice is other service for which we should be grateful.

When he began his work here as Chief Justice the Court was eighteen months behind in disposing of the cases before it. He took a leading part in devising and procuring the passage by Congress of the Act of February 13, 1925, which gave the Court a wide discretion to decide what cases should be brought before it for review, and with that change in procedure as a starting point he set about the task of bringing the work up to date with such determination and driving

force that at the end of his service as Chief Justice in February, 1930, the business of the Court was practically current, and with the completion of that task during the past year it may no longer be said that appeals to this Court are a means to delay justice or allow criminals to postpone punishment. Under his leadership this Court has set an example to the courts of the land, and brought home to the profession that it should no longer be taken for granted that courts must always be behind in their work.

During his incumbency Congress enacted the laws authorizing the erection and construction of a building to be occupied by the Court and its officers. He had largely to do with this matter and gave constant thought and effort to obtaining the necessary appropriations, acquiring the site, and above all in seeing to it that the building when completed should be a beautiful and impressive structure. This project was dear to his heart. We regret that he did not live to see the fulfillment of his efforts. The new Supreme Court building when completed will itself be a memorial of one of his services to the Court.

He had much to do with the planning and enactment of the legislation authorizing the judicial conference presided over by the Chief Justice and attended by senior circuit judges of the ten judicial circuits, which annually considers the operation of our federal judicial system for the purpose of bringing about administrative and legislative changes to increase efficiency in the administration of justice.

By his influence for a high standard in judicial appointments he rendered inestimable service to the cause of justice. As President he himself appointed five associate justices and one Chief Justice of this Court and many judges of the other federal courts. He spoke of this Court as the chief bulwark of the institutions of civil liberty created by the Constitution, and viewed the appointment of members of the Court as the most sacred duty with which he, as President, was charged. During all his public career in whatever office he held his influence was exerted to elevate the standards for judicial appointments and to combat the pressure of political expediency to force the selection of mediocre men.

With all the other demands upon him he took time to see old friends, to find new ones, to address gatherings of his fellow citizens, and to make those many public appearances expected of one in his position. His big, warm personality, kindness, and humor, with that infectious chuckle of his, will never be forgotten by those who knew him.

None of our institutions is so impregnable that popular confidence in and respect for it are not to be desired, and it is well for this Court and for the constitutional rights and liberties which it guards, each time there is chosen to the great office of Chief Justice one who in the public estimation is so preeminently fitted that his appointment is generally acclaimed. Chief Justice Taft had that fortunate distinction. What training for this high office could have excelled his? From early youth he was continuously in the public service. Within a year after his admission to the Bar he became prosecuting attorney of his county, then judge of a Superior Court. Forty-one years ago, in this very spot where I now stand, he commenced his service for the nation, as Solicitor General of the United States, and with but a short interlude, continued in the nation's service until he ended it again in this room as Chief Justice. From Solicitor General to United States Circuit Judge, then President of the

Philippine Commission, Civil Governor of the Philippine Islands, special representative of his Government on delicate diplomatic missions, Secretary of War, and President. What a preparation for high judicial office! When finally the opportunity came to place him on this Court, the whole nation knew that he was qualified by character, learning, and experience. It trusted him and believed in his judicial qualities and in his big-hearted sympathy for and understanding of the problems of plain people.

He had always yearned for service on this Court. His was a judicial mind. Political life was not congenial to him but fate seemed bound to draw him against his will into the field of political and executive action. It has been said that because of his judicial instincts it was hard for him to adjust himself to the thoughts and feelings and methods of political life in a party sense. Nevertheless twice he regretfully refused appointment as an Associate Justice of this Court because he felt he could not desert administrative responsibilities.

He made no secret of his interest in judicial work. Millions of his fellow countrymen knew of these things and sympathized with his aspirations. They held him in affectionate regard. When in 1912 his party, torn by dissension, went down to defeat and he failed of re-election to the Presidency, his lack of bitterness or rancor, his smiling acceptance of his defeat, his frank and humorous public statement that he had retired from the Presidency with the full consent of the American people, met with instant response in the public mind, and from that moment, to an extraordinary degree, he found a place in the affections of the nation. So when he came at last to the great office of Chief Justice he had the entire confidence and respect of great numbers of his fellow citizens. He held them to the end. His very presence on this Court quickened public interest in its functions, strengthened it in the public regard, and helped to maintain it as the bulwark of the Constitution.

### The Chief Justice's Reply

**M**R. ATTORNEY GENERAL: In receiving the resolutions which you have presented, we recognize that of all the tributes that have been paid to the memory of this eminent statesman and jurist, there could be none which would have been more highly prized by him than this tribute coming from the profession which he loved in recognition of the distinction of his service to the cause which was nearest to his heart.

Blessed by forbears who had achieved high repute by virtue of eminent talent and public spirit, it may be said that William Howard Taft was born to the purple of the highest advantages which our democracy affords. It was natural that his winning personality, giving play to marked ability, without suggestion of condescension, and distinguished by a nobility of character which scorned all that was sordid, base, or narrow, should have opened early the door of opportunity for public service. The gracious leadership of his youth in the circle of the university prefigured the position which he at once took at the junior bar, and after showing his mettle in his native city as prosecutor and judge, he came, at the age of thirty-three, to the office of Solicitor General of the United States. From that time until his death, he exemplified in varied undertakings of grave responsibility, the finest type of public servant and enjoyed an increasing general esteem, until, in the closing

years, after the wounds of political strife had been healed and the victories of a magnanimous spirit had been acclaimed, he was enriched beyond any man of his time with the wealth of a universal affection.

In other places, there have been, and will be, appropriate appreciation of his services as the representative of his country in novel and important duties as executive head of the new government in the Philippines, and as Secretary of War and Chief Magistrate of the Republic. It is for us to recognize with gratitude, and with a deep sense of obligation and of loss, his labors in this Court, which brought his career to the fullness of illustrious accomplishment.

Chief Justice Taft came to this service with a prestige which added weight to his pronouncements. But in the realm of lofty and conspicuous endeavor, success is never guaranteed by past achievements. It must be re-won daily, and even the highest prestige is put to fresh proof by the inescapable responsibilities of decision. Chief Justice Taft entered the Court with a distinguished reputation, but he left it with an even greater fame securely established.

This was due to his special qualifications for judicial office, by virtue of training, aptitude and temperament. His training began, as I have said, almost as soon as he was admitted to the bar. When he took executive office at the age of forty-three, he had served nearly eleven years upon the bench, and for eight of these years as United States Circuit Judge. In that work he was indefatigable, not only in the Circuit Court of Appeals but at trial terms. One who knew intimately his labors in those days has said that Judge Taft became known to the bar of his circuit as no other circuit judge had ever been before or has been since. Nor was he content with the range of his judicial duty, but in his enthusiasm for legal study he took a leading part in law school organization and teaching. The learning and strength of his judicial opinions as a Circuit Judge made him widely known. His interest was not simply in the right adjudication of particular cases, but in jurisprudence, and he consistently labored in the interest of system and coherence. It was his effort to master the special subject in hand so as to utilize it in giving a chart for the future. A conspicuous instance of this is his opinion for the Circuit Court of Appeals of the Sixth Circuit in *Addyston Pipe & Steel Company v. United States*, delivered in 1898 (85 Fed. 271), containing what was, at that time, perhaps the most thorough exposition in the American reports of the law relating to restraint of trade. The judicial service of his young manhood was rendered with a zest which never abated. And his duties and experiences in executive office heightened for him the never-failing charm of the judicial career, by reason of its independence and impartiality, and its devotion to what he believed to be the paramount interests of the administration of justice. Having begun as a student of the law, he returned to his legal studies when released from executive responsibilities, and as a lecturer on constitutional law he completed his preparation for the great task to which manifest destiny was to call him.

To Chief Justice Taft, the administration of justice was never an abstract conception, to be extolled in vain phrases and with but slight regard to changes in social conditions and to existing deficiencies. While holding in contempt the fanciful schemes with which the administration of justice in this country is threatened from time to time, he was ever pointing out its shortcomings and laboring for its improvement by practicable remedies. It was this concern which gave

him a peculiar sensitiveness with respect to the qualifications for judicial office. He realized profoundly that the chief defects of the administration of justice lie in men rather than in method. A good judge, using the means at the command of an alert and informed mind, will find but rarely that he cannot force his way through to effective action. No duty seemed to President Taft more important than that of selecting federal judges. It was his special concern while he had the responsibility of appointment, and his solicitude continued and was constantly expressed after he became Chief Justice. It has fallen to but three Presidents since Washington to appoint a majority of the members of this Court. President Jackson appointed Chief Justice Taney and four Associate Justices. President Lincoln appointed Chief Justice Chase and four Associate Justices. President Taft appointed Chief Justice White and five Associate Justices. In no act of Mr. Taft's career was his estimate of the requirements of judicial office, and his emphasis upon its proper independence of partisan considerations, more strikingly shown than in his appointment of Chief Justice White, of a different political faith, but who had represented upon the bench the highest standards of judicial conduct. And we are admonished of the rapidity of the changes in this Court, despite the apparent permanence afforded by the tenure of office, when we reflect that when Chief Justice Taft came to the bench ten years ago, only two of his appointees were still in service.

No learning or information comes amiss to a Justice of this Court. Its members have been drawn from many fields of activity, and to its conferences are brought the wisdom derived from varied experiences in different parts of our land. By reason of the variety and importance of his previous official duties, Chief Justice Taft had in this respect an unusual equipment. The learning and industry of the judge was reinforced by the special knowledge gained in statecraft. He had abundant opportunity to apply this knowledge, and it was applied with judicial independence. As illustrating this, and also as exhibiting the quality of his judicial opinions, reference may be made to *Balsac v. Porto Rico* (258 U. S. 298) and *Yu Cong Eng v. Trinidad* (271 U. S. 500), dealing with fundamental questions relating to the administration of our insular possessions; to *Stafford v. Wallace* (258 U. S. 495), sustaining and construing the Packers and Stockyards Act; to *Ex parte Grossman* (267 U. S. 87), upholding the power of the President to pardon criminal contempts; and to *Myers v. United States* (272 U. S. 52), sustaining the President's power of removal.

Because of the interest which he had shown throughout his public life in the problems affecting labor, Mr. Taft was appointed, when the United States entered the War in 1917, co-chairman of the War Labor Board. And when he came to this Court, no one had a more intimate knowledge of labor conditions in this country or was more highly respected by all those concerned in industry, whether as employers, managers or employees. There can be no doubt of his special interest in the decisions of this Court affecting labor questions, and upon these questions he delivered many of the Court's most important opinions; as, for example, in *American Steel Foundries v. Tri-City Central Trades Council* (257 U. S. 184); in *United States Mine Workers v. Coronado Coal Company* (259 U. S. 344 and 268 U. S. 295,) in the *Pennsylvania Railroad Company Cases* relating to the function of the United States Railroad Labor Board (261 U. S. 172

and 267 U. S. 203) and in *Charles Wolff Packing Company v. Industrial Court of Kansas* (262 U. S. 522) with respect to the extent of the authority of the State in the regulation of wages in industry.

Chief Justice Taft had also the technical knowledge and aptitude which gave him a special interest and authority in patent cases, and his skill in this difficult branch of jurisprudence is illustrated in such leading opinions as those in *Eibel Process Company v. Minnesota & Ontario Paper Company* (261 U. S. 45) and *Corona Cord Tire Company v. Donovan Chemical Corporation* (276 U. S. 358). The Chief Justice always had an open mind with respect to the necessary adaptation of the authority of government, especially in relation to the broadening requirements of interstate commerce under modern conditions. This was conspicuously shown in the opinions that he delivered for the Court as to the power given to the Interstate Commerce Commission by the Transportation Act of 1920, among which may be noted, as of permanent importance because of the principles definitely established, those in the cases of *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy Railroad Company* (257 U. S. 563), relating to the power of the Interstate Commerce Commission over intrastate rates, and *Dayton-Goose Creek Railway Company v. United States* (263 U. S. 456), with respect to the recapture provisions of the Interstate Commerce Act. To the growing volume of jurisprudence dealing with controversies between States, he made a notable contribution, especially in the case of the *Chicago Drainage Canal* (278 U. S. 367) and in that of *North Dakota v. Minnesota* which clearly laid down the essential bases for recovery by one State claiming injury by reason of operations conducted by another. I have not attempted the impossible task of making, upon such an occasion as this, a comprehensive survey or even a just estimate of the judicial service of the late Chief Justice, and I have sought to cite but a few of the many important opinions in which he touched every department of the law as laid down by this Court and which stand as imperishable memorials to his ability and conscientious labor.

Chief Justice Taft had, as has well been said, "an almost religious reverence" for the fundamental principles of our system of government. To quote his own words: "In the federal constitution there were embodied two great principles, first, that the government should be a representative popular government, in which every class in society, the members of which have intelligence to know what will benefit them, is given a voice in selecting the representatives who are to carry on the government and in determining its general policy. On the other hand, the same constitution exalts the personal rights and opportunities of the individual and prescribes the judicial machinery for their preservation, against the infringement by the majority of the electorate in whose hands was placed the direction of the executive and legislative branches of the government." That was his confession of faith. And he had no sympathy with any attempt to undermine the fundamental protection of fair individual opportunity upon the assumption that social riches could be gained through individual impoverishment. He stood emphatically for the limitations of government under the Constitution and was unwilling to see these limitations exceeded even when legislative phrases were used which would otherwise have been appropriate to the exercise of legislative power. This was conspicuously shown by his opinion in delivering the judgment of the

Court holding invalid the Child Labor Tax Law (259 U. S. 20), as infringing upon the reserved power of the States. "To give any such magic," he said, as was sought to be attributed, "to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States." But he did not regard the country, as he expressed it, as "tied to the defects of the past or present," and he looked for a sure progress through discriminating and far-sighted legislators and through judges of broad vision but imbued with the spirit of the Constitution.

Chief Justice Taft rarely dissented. In the multitude of cases to which you have referred, Mr. Attorney General, which were decided during his incumbency, I find but seventeen in which he expressed dissent and in but three of these did he write the dissenting opinion.

Deeply concerned with improvements in administration, the Chief Justice gave special attention to his own duty as administrator. Even the distinction of his contribution to the jurisprudence of the Court does not obscure, but throws into a stronger light, by reason of his versatility, his preeminence in the executive department of its work. In the successful endeavor to end the delays which bring such a deserved reproach upon judicial procedure, he was ever a leader, and he would have been the first to recognize the able support which he received from his colleagues in this effort. It was not a vain attempt to bring the Court up to its work by a spasmodic activity, but the intelligent formulation of a plan which receiving the sanction of Congress has put the Court, we trust permanently, upon a basis by which it can keep abreast of the demands upon it. So long as we follow the example which he has set and avail ourselves of the opportunity which his leadership provided, the delays of justice will have no countenance or illustration here.

But the Chief Justice was not content with expediting the work of this Court. He felt a special responsibility with respect to the entire Federal judicial system. Many years before he came to this bench, he had suggested that either the Supreme Court or the Chief Justice should have an adequate executive force to keep current watch upon the business awaiting dispatch in all the districts and circuits of the United States and to make a periodical estimate of the number of judges needed in the various districts and to make the requisite assignments. In a different manner, it was sought to attain the object he had in view by the establishment, in 1922, through his persistence, of the Judicial Conference of the Senior Circuit Judges, held annually, at which the Chief Justice of this Court presides, and which considers the needs of judicial service in the different districts and makes recommendations accordingly. This is an instrumentality of great value, and what it has accomplished and the promise of what it may achieve are due in the largest measure to the foresight and intelligent guidance of Chief Justice Taft.

No appreciation of the late Chief Justice can stop with appraisal of his intellectual power, or his juristic and executive achievements, or his moral worth. The glow of his warm heart shone through all his activities and irradiated all his associations. As with every virile character, he had ardent sympathies and strong dislikes. But he could not cherish ill will or long harbor a sense of injury. He carried with him an invincible armor of kindness against which the shafts of op-

ponents had proved harmless. With him, service in the temple of justice was not an austere performance, with the ill-grace of an unnatural aloofness, but a necessary human endeavor, with the dignity of lofty purpose, but pursued with a benignity and an affection for his fellows which made his presence in that temple a constant benediction.

I should, in these last words, permit those to speak who were associated with him in this work, and I can do no better than to quote what they said to him upon his retirement: "You came to us from achievements in other fields, and with the prestige of the illustrious place that you lately had held, and you showed in a new form your voluminous capacity for work and for getting work done, your humor that smoothed the rough places, your golden heart that has brought you love from every side, and, most of all, from your brethren whose tasks you have made happy and light."

There are those here who have witnessed these memorial exercises in honor of three Chief Justices. In the midst of our efforts, engrossed with present demands, we are moving with a steady and inescapable progress toward the inevitable end. The figures of today, like those of yesterday, will soon be replaced, and the best endeavors, striking as they may be in their immediate aspect, will soon form but the background of another picture. Without illusion, and with steady will, we continue in our task, heartened by the exemplars of our faith, among whom no one has a more inspiring or abiding influence than that of the late Chief Justice.

### Attorney General Presents Resolutions on Justice Sanford

**M**AY IT PLEASE THE COURT: On the very day of the death of the late Chief Justice, Edward Terry Sanford, Associate Justice, was suddenly stricken and died. Representatives of the bar, gathered together to pay reverent tribute to his memory, adopted the following resolutions, which it is now my privilege to present to the Court with the request that they be entered in its records as a token of the high esteem in which Justice Sanford was held by the legal profession.

**RESOLVED:** that the members of the Bar of the Supreme Court desire to express their profound regret at the death of Edward Terry Sanford, late Justice of the Supreme Court, and to record their high appreciation of his life and character and of his conspicuous and faithful service to his country. He was born on July 23, 1865, in the State of Tennessee. He graduated from the University of Tennessee, and then entered Harvard College, where he continued his studies; later on studying in European Universities and at the Harvard Law School. He became a member of the Bar of the State of Tennessee, and practiced at Knoxville and throughout the state, until the year 1907 when he became one of the Assistant Attorneys General of the United States. After a year in Washington, he accepted the office of United States District Judge for the Middle and Eastern Districts of Tennessee. He served, as such District Judge, for fifteen years, with marked ability and with the love and respect of the bar and community. He gave much of his time to the cause of education; was Chairman of the Board of Trustees of the George Peabody College for Teachers; also Trustee of the University of Tennessee. He was at one time, President of the Alumni Association of the University of Tennessee, and later, President of the Alumni Association of Harvard College. In the year 1923, President Harding named him as Justice of the Supreme Court to fill the vacancy arising upon the resignation of Justice Pitney. He served on this Court

with great distinction from the time of his qualification until his untimely death on the 8th day of March, 1930, at the early age of sixty-four. He had a personality of unusual charm, and was a most gifted speaker. He was a lover of literature and the arts; was widely read and deeply experienced in law and jurisprudence. He had ardent patriotism and a high sense of public duty. His work upon the Supreme Court was thorough, conscientious, and exacting, and had the high commendation of his associates and of the Bar. His death is his country's loss, and is mourned by the great circle of his friends and associates both upon the bench and at the bar.

**RESOLVED ALSO,** that the Attorney General be asked to present these resolutions to the Court and to request that they be inscribed upon its permanent records, and that the Chairman of this meeting be requested to transmit a copy of these resolutions to the family of the late Justice with an expression of our sincere sympathy in their bereavement.

Justice Sanford's career in the public service had its beginning in the suggestion of Mr. Justice McReynolds, then an Assistant Attorney General of the United States, that he be retained by the Government in the investigation of the Fertilizer Trust in 1905. The marked ability disclosed in that case secured him immediate recognition and resulted in his appointment, in 1907, to the position of Assistant Attorney General. While occupying that post, he appeared before this Court on several occasions and made a favorable impression by the skill and force with which he presented the cases entrusted to him. He attracted the favorable attention of President Roosevelt and, in 1908, was appointed to be United States District Judge for the Eastern and Middle Districts of Tennessee. He had hoped to have the post of Solicitor General, and accepted the judicial office with some reluctance, not realizing that he had been set upon the path that would lead him to the highest honor open to a member of his profession.

During the last forty-five years, those appointed United States District Judges have averaged forty-nine years of age when appointed. Judge Sanford was forty-three when he became a District Judge. His case is an example of the gain to the judicial service in appointing to the lower federal courts comparatively young men of character and education, through the opportunities for distinguished judicial careers thus opened up to them.

His service as a trial judge, which extended over a period of fifteen years, was one of exacting labor, rendered more than usually arduous by a temperament which demanded that every case be given the most careful and painstaking consideration regardless of its material importance. While at the bar he had shown a marked preference for practice before appellate courts, the quick and undeliberated decisions necessary in trial work being repugnant to his scholarly and rather cautious nature. For the same reason his duties as a District Judge were not entirely congenial to him, since he was constantly faced with the necessity of passing immediately upon questions to which he would have preferred to give more mature consideration.

Nevertheless, his preferences in no way influenced his achievements, and his record was an enviable one. The high regard in which he was held by those with whom he was associated was made evident by the spontaneous outburst of approval with which they responded to the proposal that he be elevated to the Supreme Court. When the retirement of Mr. Justice Pitney on December 1, 1922, created a vacancy, the Senate of the State of Tennessee adopted a resolution urging that

Judge Sanford be considered for the position, and the overwhelming endorsement then given him by the people from his section of the country, coupled with the desire which had always been his to become a member of an appellate tribunal, must have made his selection for the supreme bench doubly gratifying to him.

During the seven years of his service as a Justice of the Supreme Court, he delivered the opinion of the Court in 130 cases. These opinions, which are to be found in volumes 261 to 281, inclusive, of the Reports, disclose his scholarly training. In addition to his technical equipment he had that culture and breadth of vision so essential to constructive achievement in high judicial office. His professional learning was supplemented by an intimate familiarity with literature, which gave to his judicial opinions an unusual clarity and attractive style. Endowed by nature with the rare gift of felicitous expression, which he used to such good advantage at the bar, he could not be satisfied with a judicial utterance until it had been subjected to careful scrutiny to the end that the exposition of his views and the process of reasoning upon which they were founded might be full and lucid. His judicial labors were characterized by patient and conscientious deliberation upon every aspect of the case in hand. Fidelity to duty was ever his chief concern.

His judicial opinions cover most of the branches of the law with which this Court is called upon to deal. Those in the Pocket *Veto Case* in the 279th, and in the *Gitlow and Fiske* cases in the 268th and 274th, which dealt with the constitutional validity of state statutes defining criminal anarchy, are fine examples of the excellence of his judicial work.

All of his writings, as well as his concurrence in various minority opinions of other members of the Court, indicate a marked adherence to the principles on which our Constitution is based, coupled with an appreciation of the necessity of adjusting the application of those principles to fit the requirements of changing conditions. Conservative in judgment and strict in his adherence to tested doctrines, he was one of that great body of jurists who have maintained the stability of the common law system of jurisprudence.

No tribute to Justice Sanford, however brief, would be complete which touched only upon his professional achievements. His early studies, supplemented by a year of foreign travel, bred in him an enduring appreciation of music, literature, and the fine arts. He was in every sense a man of the highest culture. His mastery of the English language and his training in the field of advocacy combined to make him a speaker of unusual ability and charm. But above all his dominant traits of character were kindness and affection for his fellowmen. It is said that the necessity of passing sentence upon the many offenders who were tried and convicted before him when he was a District Judge caused him the greatest concern. His interests in the fields of education and charity were many. The joys of friendship were his constant and supreme delight.

The widespread grief occasioned by his death was intensified by the fact that, only sixty-four years of age, his faculties matured by long experience and untiring industry, he appeared to have many years of useful service before him. The nation has lost an able, highminded judge, and many of us, a gracious friend. Of him it may fittingly be said, as Campbell said of Lord Holt, "Perhaps the excellence which he attained may be traced to the affection for justice by which he was constantly actuated."

## The Chief Justice Replies

**MR. ATTORNEY GENERAL:** The Court receives with deep gratification this tribute from the bar to the service of an able and faithful member of this Court, who was taken from us, with tragic suddenness, in the midst of his career.

The strength of the Court is the resultant of the interaction and cooperation of individual forces, and the successful performance of its function depends upon the discharge of individual responsibility by Justices of equal authority in the decision of all matters that come before the Court. It has recruited its strength both from the bar and from the bench, and the contributions made to the jurisprudence of the Court by those whose judgment has been ripened by the responsibilities of administration in state and federal courts has been a conspicuous feature of its history.

Mr. Justice Sanford had the advantage not only of careful preparation for the bar under the most exacting and stimulating teachers of the law, and of valuable experience in practice, but of many years of service as a District Judge of the United States. It was the distinguished success with which he met that long-continued test that led to his appointment to this bench. He came here as a graduate of the hard school of judicial experience, and he brought with him an intimate and precise knowledge of the problems of the federal courts. Never sacrificing the dignity, impartiality and authority of his office as a District Judge to any desire for public favor, his ability and fidelity commanded their appropriate and gratifying reward in the esteem and confidence of the community that he served, so that the bar and the legislature of the State of Tennessee gave to the proposal of his appointment to this Court a unanimous endorsement. It was pre-eminently his judicial quality which won this general esteem. Without eccentricity, affectation or irritation, but with simplicity, candor, patience and thoroughness, he had applied himself to every judicial task, whether agreeable or irksome, and the applause which greeted the conduct of his office was a tribute to the standards of the community as well as to his own.

In the District Court, Judge Sanford carried a heavy burden of criminal cases and, as exemplifying his dominant traits, I may quote what has been said by an eminent member of the bar who had long observed his manner of discharging this duty; "In the administration of the criminal laws he was judge and not prosecutor. The government was only a litigant in his court suing for justice. It stood on a parity with the humblest citizen it accused. The constitution and laws of his country were to be obeyed, and not evaded, by judge, government and accused alike." Especially prominent in every activity was his unfailing courtesy and grace. Never lacking this quality himself, he looked for it in others, and in the District Court under his guidance there was afforded a notable illustration of the commendable restraint and propriety in speech which heighten rather than impair the effectiveness of forensic efforts.

In addition to sound technical training as a lawyer and broad experience as a judge, Mr. Justice Sanford had resources of culture, developed by travel and liberal studies both here and abroad. He was interested in literature, music and art, and those who enjoyed companionship with him were not disappointed because of limitations in his horizon. While the learning of the law was his supreme interest, it neither monopolized

nor narrowed him. He was happy in his public addresses and brought to many important meetings the charm of eloquence. The members of the bar cannot fail to remember with especial pleasure his address in London at the Lord Mayor's dinner at Guild Hall on the occasion of the visit, in 1924, of the representatives of the American Bar Association, and his graceful response to the welcome of the French bench and bar in the Palais de Justice in Paris. The lawyers and judges of France had the unusual and welcome opportunity of listening to an eminent member of the American judiciary paying a beautiful tribute in their own tongue to their achievements and aspirations.

You have alluded, Mr. Attorney General, to the important opinions delivered for this Court by Mr. Justice Sanford, and, as illustrating the quality of his work, you have referred in particular to the *Pocket Veto Case* (279 U. S. 655) relating to the authority of the President, and also to the cases in which Mr. Justice Sanford dealt in clear and definite utterance with the power of the State as affecting freedom of speech, upholding the necessary authority to punish abuses of that freedom (*Gitlow v. New York*, 258 U. S. 652; *Whitney v. California*, 274 U. S. 357) while also sustaining the constitutional limitations which safeguard the liberty of the citizen (*Fiske v. Kansas*, 274 U. S. 380). In his work in the District Court, Mr. Justice Sanford had given special attention to the difficult problems arising in the administration of the bankruptcy law, and he performed a noteworthy service in this Court in that branch of jurisprudence, writing a number of opinions in leading cases. *Meek v. Centre County Banking Company* (268 U. S. 426) and *Taylor v. Voss* (271 U. S. 176) are illustrations. Another outstanding judgment delivered by Mr. Justice Sanford was that in *Liberty Warehouse Company v. Grannis* (273 U. S. 70) maintaining the essential limitation of the jurisdiction of the Federal courts to "cases" and "controversies." He reaffirmed with careful emphasis the fundamental principle, as he expressed it, "that the judicial power vested by Article III of the Constitution in this Court and the inferior courts of the United States established by Congress thereunder, extends only to 'cases' and 'controversies' in which the claims of litigants are brought before them for determination by such regular proceedings as are established for the protection and enforcement of rights, or the prevention, redress, or punishment of wrongs; and that their jurisdiction is limited to cases and controversies presented in such form, with adverse litigants, that the judicial power is capable of acting upon them, and pronouncing and carrying into effect a judgment between the parties, and does not extend to the determination of abstract questions or issues framed for the purpose of invoking the advice of the court without real parties or a real case."

In estimating the value of judicial work, it is well not to lay too much stress upon opinions which seem to have a particular importance because of the public attention they receive or the spectacular circumstances of the controversies to which they are addressed. Juristic achievements are not measured by the distinction of litigants, or the amount in controversy, or the dramatic setting which gives temporary notoriety. The most worthy performance of judicial duty in the careful analysis of facts, in exact reasoning, and in the observance of a correct perspective in bringing the results of earlier controversies to their appropriate present

service, may be found in cases which attract at the time little attention on the part of the general public, but achieve importance in the annals of jurisprudence. The final reputation of a judge owes far less to contemporary estimate than to the inevitable later appraisal when his efforts find their appropriate historical setting.

Mr. Justice Sanford was keenly aware of this, and, with philosophic bent and conscientious application, he was faithful to the judicial tradition, devoting the same care to every case which came before the Court, without regard to its rating in public opinion. He was ever intent upon the intrinsic quality of his work rather than upon adventitious circumstance.

Although cut off in mid-career, as judicial careers are reckoned, we gratefully recognize the long service that he rendered in a life which enjoyed a succession of deserved honors and was crowned by the fulfillment of a worthy ambition. He met every responsibility with integrity of motive and singleness of purpose, and he discharged every trust with complete fidelity. His life is epitomized in his own words: "Youth and age have come; youth rejoicing in the splendor of life's morning; and age, steadfast in the majesty of its noonday, serene in the tender glow of its evening sky." In the midst of that serenity, the final summons came, and he was taken from us. Mourning our loss, but enriched by the memory of his friendship and cooperation, we renew our labors.

#### California State Bar Plans Unique Campaign

THE State Bar of California has begun a campaign to make the public acquainted with the functions of the lawyer and the value of the independent services which lawyers may render to their clients. Announcement of this undertaking is made in a message from President Leonard B. Slosson, printed in the June issue of the *State Bar Journal*, official publication of the organization. President Slosson gives the personnel of a committee which was appointed at a meeting of the Board of Governors of the State Bar at Modesto on May 22 to supervise and carry on the campaign in connection with a committee of the Board itself, and adds:

"This is the work outlined some time ago by a committee of members of the Board consisting of Governors Swaffield (Chairman), Bodkin and Crump. It is in line with the suggestion made to and heartily received by those in attendance at one of the sessions of The State Bar convention in Pasadena last September.

"This is an important step on the part of The State Bar, and the work, when it gets under way, will call into active service many members of the bar. The committee of fifteen above mentioned are from all parts of the State. The work will necessitate providing speakers from the ranks of the bar at public meetings, the preparation of articles by members of the bar to be published in newspapers and magazines, and the use of all other legitimate means to bring to the public notice the services that a trained lawyer can render. Through this educational work the public will be made acquainted with the proper functions of the lawyer and apprised of the value of his independent service as compared to those often offered at less or no cost by lay agencies whose first concern is their own profit, direct or indirect, rather than the interest of the client."

# THE INDEPENDENCE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

There Is No Provision in Constitution of the Court and Nothing in the Nature of Its Jurisdiction or in Its Experience in the Application of the Law Which Indicates That It Does Not Possess Complete Independence for Service as an International Tribunal\*

BY MANLEY O. HUDSON

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TO any informed student of the Permanent Court of International Justice, it must seem a bit strange that our Society should devote a session to the discussion of this topic. There can be but one excuse for our doing so, and I am not wholly convinced that the excuse is a good one. The pending proposal for the adhesion of the United States to the Protocol of Signature of the Statute of the Court is being opposed in some quarters on the ground that the Court is not an independent judicial tribunal, but is somehow subservient to the League of Nations. The contention is sometimes made in the form of a statement that the Court is "not a World Court, but the League of Nations Court,"<sup>1</sup> and this is intended to connote that the Court lacks the necessary independence to enable it to serve all the nations of the world on an equal basis. Such a contention would make little appeal to those who have been *au courant* with the development of organized international co-operation during the course of the past decade; and I would not dignify it in a presentation to this Society except for the fact that it has led to some impeachment of the integrity of the Permanent Court of International Justice at a time when it is important that the American people should know the facts, and should know them straight.

I shall address myself to three questions: Is the Permanent Court of International Justice independent in its constitution? Is it independent in the jurisdiction which it may exercise? Is it independent in its application of law?

## The Constitution of the Court

The Permanent Court of International Justice exists under a Statute, to which force is given by an international instrument called a "Protocol of Signature." This protocol has been signed on behalf of fifty-five states, of which the United States is one, and ratified by forty-five states of which the United States is not one.<sup>2</sup> Though it is called a *protocol*, it might with no less accuracy have been called a treaty or a convention. It is the Protocol and that alone which gives life to the Statute of the Court, and the Statute is, as Judge Kellogg

recently observed, the "fundamental law" of the Court.

Both the Protocol and the Statute must be interpreted, however, in the light of their history. Their origin is to be traced to Article 14 of the Covenant of the League of Nations, the first sentence of which provided that the Council should "formulate and submit to the members of the League for adoption plans for the establishment of a Permanent Court of International Justice." This mandate having been executed, the force of that sentence is now spent. Two additional sentences related to the jurisdiction of the Court, and to giving advisory opinions; these were incorporated by reference into Article 1 of the Statute of the Court, and their provisions are in force today, because of this incorporation, as provisions of the Statute itself.<sup>3</sup> It would seem proper to say, therefore, that the Covenant of the League of Nations as such forms no part of the organic law of the Court, and that the Statute is its only organic law.

One further point should be noticed, however. When the plans for the court were "formulated" in a draft statute, they were submitted by the Council to the members of the League of Nations, through the Assembly of the League of Nations. It was in the Assembly that the Statute achieved definitive form, and on December 13, 1920, the Assembly adopted a resolution declaring its "approval" of the draft, and directing the preparation of a protocol to be signed and ratified, by which the states should declare their "recognition of this Statute." Certain provisions of this resolution, relating to the Statute's coming into force and to its remaining open for signature by certain states, were incorporated by reference in the Protocol of Signature. The resolution did not purport to establish the Court; it did not even purport to give force to the Statute; it is to be treated as one of the stages in the preparation of the Statute, but it forms today no part of the Court's organic law nor has the Assembly assumed a competence to deal with changes in that law during these intervening years. In 1926, when a proposed adhesion

\*An address before the American Society of International Law, at its twenty-fifth Annual Meeting in Washington April 24, 1931. To be published in the Proceedings of the American Society of International Law, 1931, and printed here with permission.

1. See Senator C. C. Dill, in the *Advocate of Peace*, February, 1931, p. 37.

2. For various lists, see 26 *American Journal of International Law* (1931), pp. 13ff.

3. Article 1 of the Statute reads in part: "A Permanent Court of International Justice is hereby established, in accordance with (conformément) Article 14 of the Covenant of the League of Nations." If this did not incorporate the second and third sentences of Article 14 of the Covenant, it might be possible for these sentences to be amended, according to Article 26 of the Covenant, without the consent of all states parties to the Statute through ratification of the protocol of Signature. See the writer's discussion of this point in *International Conciliation*, No. 214 (November, 1926), pp. 328ff.

by the United States was under consideration, the matter was dealt with not by the Assembly, but by an independent Conference of the Signatories to the Court Protocol, and the same procedure was followed in 1929 when it was proposed to amend the Court's Statute. Strictly, therefore, though no one should minimize the admirable role played by the Council and the Assembly of the League of Nations and by the Committee of Jurists set up by the Council, the Court does not legally owe its existence to any action except that taken by the various states in signing and ratifying the Protocol of Signature. The action of the Assembly in approving the draft Statute, and its action again in 1929 in approving the draft protocol for a revision of the Statute, can hardly be looked upon as one of the legal steps taken to bring the Court into existence or to shape its constitution.

If these conclusions be shared, it may then be agreed that the Protocol of Signature, equivalent for this purpose to a treaty, is the only instrument effective for giving force to the Statute of the Court, and that the Statute of the Court is its only constitution. No state which becomes a party to the Protocol of Signature thereby assumes any obligation contained in any other than these two instruments. In its constitutional form, the Court is independent of all other agencies except the States which created it.

#### Relation to the League of Nations

This is not to be understood as implying, however, that the substantive provisions of its constitution leave the Court wholly unrelated to other bodies. There is a very intimate relation between the Court and the League of Nations, according to the provisions of the Statute itself. In the first place, the judges of the Court are elected by the Council and Assembly of the League of Nations. Obviously, they must be elected by an international group of some kind; and for this purpose these bodies serve admirably. Since 1921, six elections have been held, and I think the ease with which they were conducted<sup>4</sup> has been a surprise to every one familiar with the difficulties encountered at the Hague Peace Conference when the effort was being made to set up a permanent international tribunal. Not only are the Council and Assembly convenient bodies for the election, especially convenient because of their periodic meetings, but in their very composition they have solved the difficulties which wrecked earlier efforts. The composition of the Assembly is based upon the principle of equality of states, so that smaller states are assured of a voice in the election of judges. The composition of the Council, on the other hand, takes account of the special position of more powerful states which are entitled to permanent representation on the Council. The larger states are therefore assured of voting in both of the electoral bodies.

The significance of this adjustment cannot fail to be appreciated by any one who is familiar with the experience of the Second Peace Conference at the Hague. But perhaps its importance lies chiefly in the fact that it surmounted the principal obstacle to the creation of a Court. The potential control of elec-

tions which may be exercised by the Great Powers, is now less than it was; in 1921, when the first general election of judges was held, the Powers permanently represented on the Council were four out of eight; in 1930, when the second general election of judges was held, they were five out of fourteen. This change has produced no dissatisfaction with the system of elections among states members of the League of Nations. If the United States should adhere to the Protocol of Signature, on the terms now proposed, its representatives would be added to the Council and Assembly to form the electoral bodies; and if the pending revision of the Statute should become effective, arrangement might also be made for the addition of representatives of Brazil and of other states similarly situated. The electoral system is not intended to exclude states not parties to the Covenant of the League of Nations; it is a convenient system; it has proved itself workable; and it leaves the judges of the Court as free as any acceptable system which might be devised. I must conclude that the Court is in no way dependent on other bodies as a consequence of this method of selecting the judges who will sit on its bench.

Another respect in which the Court has a relation to the League of Nations, is in its financial support. The Statute provides (Article 33) that "the expense of the Court shall be borne by the League of Nations." This is a short way of saying that the expenses are to be borne by the states members of the League of Nations. As the forty-five states which have ratified the Protocol of Signature are all, save Brazil,<sup>5</sup> members of the League of Nations, it is very natural that they should desire to avoid the necessity of any wholly independent budget for the Court. The Court's budget now amounts to almost \$500,000 a year. The determination of the amount of each state's contribution presents difficult questions, which have already been satisfactorily solved in connection with the expenses of the League of Nations; and a machinery for collecting and disbursing such large sums of money has been established at Geneva. It would have been folly to duplicate such machinery. The utilization of the financial organizations of the League of Nations does not rob the Court of one iota of its independence; indeed, it renders the Court truly independent by relieving it of all responsibility for financing itself, beyond that of saying each year how much money it needs. Under any possible system, the Court's annual budget would have to be approved by the states which supply the money, and the Assembly of the League of Nations is the most convenient forum for the expression of that approval, even though it includes representatives of states which have not ratified the Protocol of Signature. No judge's salary can be reduced during his term of office, and in this respect the judges of the Permanent Court of International justice are as independent as the judges of the Supreme Court of the United States.

It is only in these two respects that the constitution of the Court connects it with the League of Nations. I believe the Court is immensely stronger because of the connection; its permanence is better

4. See the writer's study entitled "The Election of Members of the Permanent Court of International Justice," in 24 *American Journal of International Law* (1930), p. 718.

5. Brazil ceased to be a member of the League of Nations on June 12, 1928.

assured, its functioning is facilitated, and it is relieved of problems which might otherwise grow embarrassing. It seems to me that there is not the slightest ground for saying that this connection destroys the independence of the Court for judicial work.

#### ✓ Jurisdiction in Contested Cases

The jurisdiction of the Permanent Court of International Justice is of two kinds; it has jurisdiction to adjudicate disputes between states; and it has jurisdiction to give advisory opinions. Both kinds of jurisdiction were mentioned in those parts of Article 14 of the Covenant of the League of Nations which were incorporated by reference into Article 1 of the Court's Statute.

The Court is not competent to adjudicate a dispute between two or more states unless all parties to the dispute submit to its exercise of such jurisdiction. No such submission is contained in the Statute itself; indeed, a State may be a party to the Protocol of Signature to which the Statute is "adjoined" without giving to the Court any jurisdiction whatever. It is proposed that this course should be taken by the United States, and if the protocol for American adhesion becomes effective the Court will not thereby have any jurisdiction over our disputes. To the Statute is annexed, however, a so-called "optional clause," which may be accepted by states which desire to do so. Thirty-four states are now bound by this "optional clause," and have thereby conferred on the Court a jurisdiction which is "compulsory *ipso facto* and with special agreement," extending to "legal disputes" in some or all of the following "classes": (a) disputes concerning the interpretation of a treaty; (b) disputes concerning any question of international law; (c) disputes concerning the existence of any fact which, if established, would constitute a breach of an international obligation; and (d) disputes concerning the nature or extent of the reparation to be made for the breach of an international obligation. This provision goes a long way toward making the Court's jurisdiction independent not merely of all international organizations, but even of the further expression of the will of the states themselves.<sup>6</sup> It is too early to express a definite judgment of the value of the optional clause; it has been invoked only in one case, and in that case the proceeding was withdrawn before judgment.

The Statute also provides that the jurisdiction of the Court comprises "all matters specially provided for in treaties and conventions in force." During the past ten years, numerous treaties have been concluded which provide for resort to the Court for the adjudication of disputes or differences. It has become a common practice to include some provision of this sort in multipartite treaties; and many of the recent bipartite treaties, particularly treaties of arbitration, have contained it. A collection of texts governing the jurisdiction of the Court, published in the Court's annual reports, lists 322 instruments under that title. Even the United States is a party to two international instruments which envisage a possible use of the Court in connection with their construction: the Slavery Convention,<sup>7</sup> of September 25, 1926, and the Con-

vention on the Abolition of Import and Export Prohibitions and Restrictions,<sup>8</sup> of November 8, 1927.

Apart from its jurisdiction under the "optional clause" and under such treaties as I have described, the Court has no competence to deal with a dispute unless the dispute is specifically referred to it by the parties thereto. The reference is effected by a special agreement, or *compromis*, and the Court has repeatedly shown its determination to confine itself strictly within the limits of such agreements. In such cases there can be no question of the complete independence of the Court. In determining whether it has jurisdiction, whether the states concerned have conferred it, the Court is subject to no outside influences whatsoever.

#### ✓ Jurisdiction to Give Advisory Opinions

It is chiefly in connection with the Court's competence to give advisory opinions, that the independence of the Court has been questioned in America. This competence is usually traced to the third sentence of Article 14 of the Covenant which states that "the Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly"; but the force of that statement is now derived, not from its inclusion in the Covenant but from its incorporation by reference into Article 1 of the Statute of the Court. The wisdom of this provision has been abundantly demonstrated during the course of the past nine years; for the Court has given seventeen advisory opinions,<sup>9</sup> and it now has before it two requests for advisory opinions. The exercise of this competence by the Court has meant a great increase in both the usefulness and the prestige of the Court, and the provision may have saved the Court from being merely an ornament on our international shelf.

Effort has been made in some circles in the United States to make it appear that this competence of the Court has reduced it to the position of merely a legal adviser to the Council and Assembly; but any one who studies the actual procedure followed and the office served by advisory opinions should know that such a figure of speech is a complete distortion of the facts. In the first place, no advisory opinion will be given by the Court except at the conclusion of a proceeding which is essentially judicial in its character. According to the Rules of Court since the beginning, this proceeding has to be initiated by a "written request," duly authenticated as issuing from the Council or Assembly. The request must contain "an exact statement of the question upon which an opinion is required," and it must be accompanied by all the relevant documents available. Notice of the request is given to all states entitled to appear before the Court, and "a special and direct communication" of it is made to those states which may be particularly interested. A time limit is then set within which the Court will be prepared to receive written statements from interested states and to hear oral arguments. Any of the sixty-eight states to which the Court is open may ask to be heard by the Court. A state availing itself of the privilege of submitting a statement or argument, may also comment upon

6. Most of the states now bound by the optional clause have accepted it for only a limited period.

7. U. S. Treaty Series, No. 778.

8. U. S. Treaty Series, No. 811.

9. The refusal to give an opinion in the Eastern Carelia Case is not included in this number. It is published in the collection of advisory opinions, however. Series B, No. 5.

statements or arguments submitted by other states. At the conclusion of this procedure, the full Court deliberates, and if and when it decides to give an opinion, advance notice is given to the states "immediately concerned," the opinion is read in open Court and is published in a special series of the Court's publications. In other words, all the essentials of judicial procedure are scrupulously observed.

In the second place, the Court has gone far to assimilate its procedure followed in these cases to that which is followed when a dispute is submitted for judgment. If the request for an advisory opinion relates to a dispute between two or more states, each of the parties to that dispute is entitled to have on the Court a judge of its own nationality.<sup>10</sup>

I think it is clear, therefore, that an advisory opinion given by the Court bears no resemblance whatever to ordinary legal advice which may be given by a counsellor. Whoever heard of an Attorney-General's going through a procedure similar to that which I have described, before giving an opinion to some authority of his own government? No Attorney-General could function as such if he were limited as the Court is limited in giving its advisory opinions. Some of the State courts in the United States have long given advisory opinions—in Massachusetts, the Justices of the Supreme Judicial Court are required to give such opinions to "each branch of the legislature, as well as the governor and council," and in the one hundred and fifty years during which this requirement has existed they have given more than one hundred and fifty advisory opinions. No such procedure as I have described for the Permanent Court of International Justice is followed by the Justices of the Supreme Judicial Court of Massachusetts, who act without any hearing of persons specially interested; yet in all this one hundred and fifty years no voice has been heard to say that the Supreme Judicial Court was acting as the Attorney-General of Massachusetts. The Commonwealth of Massachusetts has an Attorney-General whose office is wholly distinct from the Supreme Judicial Court; and similarly the League of Nations has a *Legal Adviser* who has no connection whatever with the Permanent Court of International Justice, who in fact has never once appeared before the latter.

One other point deserves to be noticed. In all of the twenty-one instances<sup>11</sup> in which the Council has requested the Court to give advisory opinions, there has never been an intimation even in whisper that the Council as a body, or that a person sitting on it as a representative of any state, has attempted to influence the Court in deliberating on the request. In one case, the Court refused to give an opinion as requested; there the request related to a dispute, and when one of the parties to the dispute challenged the competence of the Court, it proved to be impossible for the Court to comply with the request within the judicial limitations which had been set. Of course, as the Statute now stands, the Court has power to remove these limitations; but it has shown no disposition to do so, and

the amendments to the rules promulgated by the new bench of the Court on February 21, 1931, left all of the limitations intact. If the pending revision of the Statute should become effective, or if the protocol for American adhesion should come into force, the Court would be deprived even of its power to remove these limitations.

If the facts are understood, therefore, it should be beyond refutation that the advisory jurisdiction of the Court does not in any way decrease its independence as a judicial tribunal. It constitutes no departure whatever from familiar standards of Anglo-American judicial history; and it makes the Court in no way subject to the command or dictation of any other authority. But these conclusions are negative. On the positive side, I think it is not to be contested that because of this jurisdiction the Court has played a much larger role during the past ten years. Its usefulness in the international life of our time has been more than doubled. In seventeen instances, advisory opinions have been given which have facilitated the solution of as many international problems. The giving of such opinions has been acclaimed very generally by lawyers of other countries, and it seems to me that there is every reason why this feature of the Court's activity should be approved by the legal profession in America.

#### ✓ The Law Applied by the Court

It is one of the astonishing features of the present situation in America that in some quarters hospitality seems to be given to a contention that the Court is not independent in its application of law. This contention is sometimes phrased as a suggestion that the Court is not free to find the law applicable to a case before it, but is bound to take its law from the League of Nations. Of course any such statement is palpably untrue. Article 38 of the Statute of the Court lays down the sources of the law which the Court shall apply, and its provisions have met with such general favor that they were copied *verbatim* in Article 1 of the General Treaty of Inter-American Arbitration, signed at Washington on January 5, 1929.<sup>12</sup> Four sources are listed from which the Court must get its law: (1) international conventions by which the parties to a dispute may be bound, (2) international customs, (3) general principles of law recognized by civilized nations, and (4) judicial decisions and the teachings of the most highly qualified publicists. Of course the Covenant of the League of Nations falls among the first of these sources for the states which are parties to it, and to the extent to which it creates obligations for such states it is as much a part of existing international law as any other conventional agreement. Fifty-four states members of the League of Nations could not be expected to create a Court to ignore that most important instrument.

Nor is there the slightest basis, in the ten years' experience of the Court itself, for any reflection on its complete independence in its application of international law. So far as I know, no intimation has been made in any country that the Court has ever received any suggestion from an outside source, or has ever been interfered with in

10. This is the effect of an amendment to Article 71 of the Rules, promulgated on September 7, 1927. Series D., No. 1 (addendum).

11. One request for an advisory opinion was withdrawn by the Council.

12. For the text, see 23 American Journal of International Law (Supp., 1929), p. 22.

any way in its actual deliberations. Of course the judges act under the limitations of their own personalities; no judge can throw off his own personal experience when he dons the ermine; each judge is nurtured in the traditions of some one country, and such traditions may mould his conceptions of international law. But while sitting on the Court he is completely independent of the government of his own country, and he is entirely free to exercise his powers "honourably and faithfully, impartially and conscientiously," as his oath requires.<sup>13</sup> Indeed, in several cases before the Court, judges have voted against the contentions of their own governments.<sup>14</sup>

#### General Conclusion

To summarize what I have said, I cannot find any provision in the constitution of the Court, nor in the nature of its jurisdiction, nor in its experience in the application of law, to indicate that the Court does not possess complete independence for service as an international tribunal. It is as independent as the Supreme Court of the United States; it is no more controlled by the League of Nations because of the method of electing the judges and of paying their salaries, than is the Supreme Court of the United States controlled by our President and Congress because judges are appointed by the President and their salaries are voted by Congress.

If this conclusion is sound, it may then be asked—why have we in America heard so much agitation against the Permanent Court of International Justice, on the ground of its lack of independence? I think the reason is not difficult to find. It is largely because of the failure of our public to understand and to appreciate the League of Nations. The Court is related to the League in a very important way. The fact has not been denied by any responsible supporters of American adherence to the Court Protocol. But there are still some people in America who seem to be unwilling to admit that the League of Nations exists. Apparently these persons want to say that the action of our President and Senate in 1920 not only kept the United States out of membership in the League, but also killed the League which other nations had created and which for eleven years they have maintained with increasing usefulness to themselves and to the world. Such persons seem to fear that our Government would suffer grievous harm if it had any relations with other States through the League of Nations. Of course that is not the position of the Government of the United States, and it can never be the position of our Government. We have learned during this past decade that in our own interest we cannot afford to ignore what other states may attempt to do by organized, co-operative effort; and if it is not ignored, it must be even tolerated, acknowledged and in some cases participated in. The Government of the United States is today preparing for participation in a Disarmament Conference to be held under the auspices of the League of Nations in 1932. Last month it was represented at a Conference on Cheques and at a Conference of Police officers, both called to meet in Geneva by the Council of the League of Nations; next month

it will be represented at a Conference on the Limitation of the Manufacture of Narcotic Drugs, similarly meeting in Geneva under League auspices. The United States is a party today to two of the so-called League of Nations conventions; it has adhered to the convention on slavery of September 25, 1926, by which it has undertaken to communicate to the Secretary General of the League of Nations any law or regulations it may enact in execution of the Convention; and it has signed and ratified the Convention on abolition of Import and Export Prohibitions and Restrictions, of November 8, 1927, which contains a somewhat similar provision. Moreover, this latter instrument envisages for cases of disputes a possible system of advisory opinions to be given by a technical body appointed by the Council of the League of Nations.

These are but a few of the many instances in which the Government of the United States has co-operated with other governments through the League of Nations. Our adherence to the Court Protocol would involve us in a certain amount of further co-operation of this nature, for which we now have many precedents. Surely this can be opposed only by those who would refuse to recognize the facts in our present international situation. The League of Nations is one of those facts, and I think it is also a fact that no international tribunal wholly unconnected with the League of Nations can be created in the course of our generation. Fifty-four other states of the world, whose co-operation for that purpose is essential, will not join with us in creating a wholly unrelated tribunal.

The Permanent Court of International Justice is not weaker but stronger because it is connected with the League. The connection ought to be welcomed by lawyers who wish to see such an institution a vital force in the life of our times. To me, it assures greater permanence for the tribunal, a smoother functioning and a far greater influence; and it in no way impairs the Court's complete independence for judicial work. If one likes, he may even speak of the Court as a "League Court." There are facts which will justify such a description of it. But the American people ought to have those facts as they are, and I think the members of this Society should see that the facts are not distorted. We should urge the Court's connection with the League as one of the elements of its strength. The establishment of the Court is the greatest achievement of our generation for the development of international law. Its success during the past ten years is a triumph of which every Society of International Law can be proud. The prospect for its future as an independent tribunal administering justice according to law is so bright that it should command the enthusiastic support of every American lawyer.

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13. See Article 8 of the Rules. Series D, No. 1 (second edition).

14. See particularly advisory opinion No. 4, in Series B, No. 4, where Judge Weiss concurred in the unanimous opinion which was contrary to the position taken by the French Government.

# AIRCRAFT LIABILITY TO PERSONS AND PROPERTY ON GROUND

Drastic and Far-Reaching Effect of Section Five of Uniform State Law for Aeronautics Has Not Been Generally Considered by Bar Even in Those States Where It Has Been Adopted—Sample Cases to Which the Section as Now Drafted Would Apply—Possible Constitutional Attacks on Provisions

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THE rapid growth of the aircraft industry and the extension of air-transport lines into every section of this country have brought into increasing prominence the legal problems created by the flight of such aircraft. Of all such questions, there are perhaps none more harassing or more difficult to answer than those affecting the liability of the owner, lessee, operator or pilot of aircraft which directly or indirectly causes damage to persons or property on the ground. At the recent meeting of the American Law Institute in Washington, in considering a tentative draft of the restatement of the law of torts, some discussion was had of the provisions and effect of Section 5 of the so-called Uniform State Law for Aeronautics, which section was drafted to cover this phase of aircraft liability. As it was then apparent that members of the bar generally had not considered the drastic and far-reaching effects of that section of the Uniform State Law for Aeronautics, even in those states in which it had been adopted, it seems that further discussion of this important topic might be useful.

This Uniform Law was originally prepared by a committee of the American Bar Association in cooperation with the Committee on Aeronautics of the National Conference of Commissioners on Uniform State Laws. Up to January 1st, 1931, so far as information now available would indicate, this Act had been adopted in twenty-one jurisdictions: Arizona, Delaware, Hawaii, Idaho, Indiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nevada, New Jersey, North Carolina, North Dakota, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont and Wisconsin. In four of those states—Arizona, Missouri, Montana and Pennsylvania—Section 5 relative to damages on land, has either been omitted from the Act or modified. The Act was originally recommended in 1922 and was first adopted by several states in 1923. It would therefore appear that notwithstanding the rapid growth of aviation the proposed Uniform Act has become law in less than half of the states of the Union. It seems to be the opinion of various authorities who have carefully considered this problem that the provision which has caused the chief trouble in having the said Uniform Act adopted is this Section 5 relating to damages to persons and property on the ground. (See Freeman "Survey of State Aeronautical Legislation," 1 Air Law Review 70; Davis, "Aeronautical Law," 310).

The said section is as follows:

"Section 5. The owner of every aircraft which is operated over the lands or waters of this State is absolutely liable for injuries to persons or property on the land or water beneath caused by the ascent, descent, or flight of the aircraft, or the

dropping or falling of any object therefrom, whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person injured, or of the owner or bailee of the property injured. If the aircraft is leased at the time of the injury to person or property, both owner and lessee shall be liable, and they may be sued jointly, or either or both of them may be sued separately. An aeronaut who is not the owner or lessee shall be liable only for the consequences of his own negligence. The injured person, or owner or bailee of the injured property, shall have a lien on the aircraft causing the injury to the extent of the damage caused by the aircraft or objects falling from it."

It will be noted that this section applied to (a) the owner of every aircraft which is operated over the lands or waters of the state in which the Act is adopted; (b) that such owner is absolutely liable for (1) injuries to persons, or (2) property on the land or waters beneath; (c) that such absolute liability exists when such injuries are caused (1) by the ascent, descent or flight of the aircraft, or (2) the dropping or falling of any object therefrom; (d) that such liability exists *whether such owner was negligent or not*; (e) that such liability exists unless the injury is caused in whole or in part by negligence of the parties injured, or of the owner or bailee of the injured property. This short analysis of the language of the statute indicates its far-reaching effect. Under Section 5 the owner of the aircraft is denied every right of defense except contributory negligence. In every other case, the existence of the injury creates absolute and unanswerable liability, no matter what might be the extent of the damage and no matter what might be the status of the aircraft that caused the damage. The sole proof which the injured person would need, under this section, would be proof that the defendant was the owner of the aircraft. If contributory negligence is not pleaded and proven, the mere fact of such ownership without more would require the entry of a verdict for whatsoever amount of damages the jury might find. The following are submitted as cases to which Section 5, as now drafted, and as adopted in seventeen states, would apply:

*Case 1.* Aeroplane A properly manned, equipped and operated, proceeding on its course, is struck down by aeroplane B, the latter plane being out of control due to negligent operations. Both planes fall—plane A does serious property damage to property on the ground as a result of such fall. Suit is brought against the owner of plane A. Witnesses are present who are prepared to testify without contradiction that plane A was entirely without fault, and that the entire fault was that of plane B, which caused the collision. Under Section 5 testimony of such witnesses would be immaterial and the owner of plane A would be liable for

the full damage caused by the fall of plane A so far as damage is caused persons or property on the ground.

*Case 2.* Plane A is proceeding, properly manned and equipped. A sudden "twister" or similar cyclonic disturbance appears, or the said plane is struck by lightning. The plane falls, and does damage to persons or property on the ground. In either case testimony is available to prove that the plane was properly manner, equipped and operated, that the owning company took heed of all weather forecasts and otherwise took every precaution to see that its planes were not operated in dangerous weather and that the weather conditions which caused the fall of the plane could not have been expected. A clear defense case can be produced by uncontradicted testimony that the accident was caused by the "act of God" or vis major. Under Section 5 of the Uniform Act this testimony is not material and the owner of the plane is responsible for all damages.

*Case 3.* The owner of the plane keeps the same in a proper hangar, under lock and key and keeps a watchman in attendance. Thieves kill the watchman, break into the hangar and steal the plane. While the plane is in flight it falls due to negligent handling by one of the thieves who had stolen it. As a result of such fall damage is done to persons or property on the ground. The thief is not killed and confesses the facts of the theft and admits his entire responsibility. Suit is brought for civil damages by the owner of the property damaged against the owner of the plane. In defense, the confession of the thief is tendered in evidence. But, under Section 5 of the Uniform Act, this is immaterial because the owner of the plane is liable for damages resulting from its fall no matter who is in charge, and regardless of all other circumstances than the fact of ownership.

*Case 4.* Plane is stolen under similar circumstances as specified in Case 3. The purpose of the theft is to use the plane to drop bombs on a mine or factory or do other malicious damage. Bombs are dropped by one of the persons who stole the plane and the bombs cause serious damage. The thieves who stole the plane and dropped the bombs are captured and confess the entire plot. Suit is brought by the owner of the damaged property against the owner of the plane because Section 5 specifically places liability on the owner of the plane for the damage caused by the dropping or falling of any object from the plane. The confession and undoubted testimony of the perpetrators of the outrage is not material in defense, and the owner of the plane is liable for damages to an enormous amount for the destruction of a valuable mining or factory property thus damaged by the bombs dropped from the stolen plane.

The statement of these supposed cases is sufficient to indicate the results to which this legislation can easily lead. It is not suggested that such results were contemplated or intended by the framers of this Act or the several Legislatures which have adopted it, nor is it believed that the members of the bar in those states where this Act is in force realize the effect of the section. This section of the Uniform Act puts the owner of any aircraft of any type in the same category with the owner of a deadly reptile or other vicious wild animal. In fact, it is not clear from the modern cases whether the owners of such wild animals have as much liability as do the owners of aircraft under the Uniform Act.

What this section does is to attribute liability to the fact of ownership of the aircraft without reference

to its use. Whether this section would stand a vigorous constitutional attack may be doubted. It embraces the most far-reaching statutory enactment of liability without fault which can be found in the books. It may be argued that transportation by air is a hazardous, or, as has been recently suggested, an extra-hazardous operation, and that the person responsible for the causation of such hazardous operation must be held responsible for resulting damage or injury to persons not part in such operation and who are thereby injured. It may also be suggested, as has been rather naively indicated by one writer on the subject, that the liability of the aviator to the person damaged on the ground should be made absolute by reason of the fact that such liability can be covered by insurance and that the burden of procuring the insurance should be placed on the aviator rather than on the man on the ground. Such argument might be in point in discussing the question of whether or not at the common law and without enactment of statute, there is absolute liability on the responsible aviator, or the owner or operator of aircraft directing the operations of such aviator, when damage is caused to persons or property on the ground. In that case, it has been urged that liability should be absolute, and it has otherwise been contended that such liability of such aviator, owner, or operator should be governed by some rule of *res ipsa loquitur*, or that there should be liability only on proof of negligence. With these problems, any discussion of Section 5 is not concerned. This section boldly and without exception or equivocation holds the owner responsible for all damage caused to persons or property on the ground (unless contributory negligence be shown) and this absolute liability exists by legislative fiat as a result of the status of ownership of aircraft, and without considering whether such owner had any control, direct or indirect, of the aircraft at the time of the flight causing the injury.

In considering the validity of this section, it has been suggested by a recent writer that the section may be invalid as constituting an undue interference with and burden upon interstate commerce by air (Davis, "Aeronautical Law," 311). There is no doubt that a most peculiar situation is created and the effect on interstate commerce is certainly most detrimental when, by passing in the air from one state to the next, the absolute liability of the owner of the aircraft for possible damage to persons or property on the ground changes from time to time, dependent on whether or not the state in which the aircraft is flying has or has not adopted Section 5 of the Uniform Act.

Another possible constitutional attack upon this provision might be predicated on two decisions of the Supreme Court of the United States decided in 1929. These decisions seem to cast very grave doubt on the validity of statutory enactment by legislative fiat of the rule of absolute liability. Both of these decisions are by Mr. Justice Butler. In *Manley v. Georgia*, 279 U. S. 1; 73 L. Ed. 573, the court was called upon to construe the Georgia Statute which provided in substance that every insolvency of a bank should be deemed fraudulent and the President and Directors should be punished for a term named in the Statute, provided, however, that the defendant might repel presumption of fraud by showing that the affairs of the bank had been properly administered. The statute was attacked upon the ground that the presumption created by it was so unreasonable and arbitrary as to amount to a denial of due process of law in violation of the 14th Amendment. In deciding the case the Court held that State

Legislation providing that proof of one fact or group of facts shall constitute prima facie evidence of the main or ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred—that if the presumption is not unreasonable and is not made conclusive of the rights of the person against whom raised, it does not constitute a denial of due process of law; but that a statute creating a presumption which is arbitrary or that operates to deny the fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. It was further held that mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property. The statute was held invalid. In a later case (*Western & Atlantic Railroad Company vs. Henderson*, 279 U. S. 639; 73 L. Ed 884) the Supreme Court considered another section of the Georgia Civil Code, which is as follows:

"A railroad company shall be liable for any damage done to persons, stock or other property by the running of the locomotive, or cars or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, and presumption in all cases being against the company."

The court in its opinion considered the charge given to the jury by the lower court and then proceeded to hold the statute unconstitutional. In deciding this case Mr. Justice Butler used much of the same language which he had used in writing the opinion in the *Manley* case, supra, saying, among other things:

"Legislation declaring that proof of one fact or group of facts shall constitute prima facie evidence of an ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the 14th Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property."

From the foregoing decisions it seems that Section 5 of the Uniform State Law of Aeronautics might be subject to the same attack made on the Georgia statute. In Section 5 the owner of the aircraft is given an apparent right to defend by showing that the person injured was guilty of contributory negligence. But the legislative fiat of liability arising from the mere fact of ownership of the aircraft and from the mere happening of the accident still stands, exactly as did the presumption of negligence under the Georgia railway statute, before it was declared unconstitutional. In an earlier case (*C. R. I. & P. Ry. Co. v. Zernecke*, 183 U. S. 582, 46 L. Ed. 339) the Supreme Court had said (as obiter) with reference to a Nebraska statute, that "the specific contention is that the company is deprived of its defense and not only declared guilty of negligence and wrong-doing without a hearing, but adjudged to suffer *without wrongdoing, indeed even for the crimes of others which the company could not have foreseen or have prevented*. Thus described, the statute seems objectionable."

Since January 1st, 1931, it appears from present information that two states have adopted statutes effecting this subject matter. Wyoming on March 5th, 1931, adopted an Act known as Chapter 106 of the Laws of 1931, which would appear to be a partial revision of the Uniform State Act. The clause with reference to

damages to persons or property on land is not included. On March 11th, 1931, Idaho adopted an Act known as Chapter 100 of the Laws of 1931, entitled "An Act concerning aeronautics and to make uniform the law with reference thereto." Section 5 of the Act as thus adopted departs very materially from the theory of Section 5 of the original Uniform State Law. The first part of said Section 5 is as follows: "The owner or the operator, or either of them, of every aircraft which is operated over the lands or waters of this State shall be liable for injuries or damage to persons or property on or over the land or water beneath, caused by the ascent, descent or flight of aircraft, or the dropping or falling of any object therefrom, in accordance with the rules of law applicable to torts on land in this State."

Assuming that the law of torts in Idaho is based upon the ordinary common law rules, it would seem that Idaho has joined the list of those states refusing to accede to the drastic theory of absolute liability in Section 5 of the Uniform Act as originally drafted.

#### Publications of Division of Commercial Laws for April, 1931. Bureau of Foreign & Domestic Commerce, Department of Commerce

Articles appearing in "Commerce Reports" (including March 23 and 30 and excluding April 27).

On page 775 of C. R. for March 23, 1931, the amendment to the Mexican insurance law is discussed at length. By Presidential Decree, promulgated in the *Diario Oficial* of January, 1931, further restrictions are placed on the investments of foreign insurance companies, making it unlawful for them to divide, among their Mexican insured, dividends accruing from outside operations.

The new Cuban emergency tax law, published in January, 1931, will affect practically all kinds of business activities in Cuba, and should be of special interest to exporters and all others disposing of their products in Cuba. A notice of this law appears in C. R. for March 23. The text is covered by Special Circular No. 259.

An article on "Accumulation of Property Attached Prior to Bankruptcy in Mexico" is printed in C. R. for April 6 at p. 53, and should prove of interest to exporters to Mexico. The pertinent decision of the Supreme Court of that country is to the effect that goods attached in an action in which final judgment has been obtained prior to the bankruptcy of the debtor can not be brought into the mass of the bankrupt estate.

Following is a complete list of material published: Special Circulars Nos. 257, Tax Modifications in Great Britain; 258, Registration of Foreign Corporations in Costa Rica; 259, Cuban Emergency Tax Law; 260, Business of Life Insurance in Italy; 261, Taxation in Austria; 262, Contracts Involving "Futures Sales" Cotton; 263, Colombian Petroleum Law; 264, Canadian Legislation Governing Restraint of Trade; 265, Taxation of Foreign Agents of Spanish Shippers.

Articles published in Commerce Reports: March 23: Mexican Insurance Law Amended; Department of Provisions in Colombia Abolished; Trade-Mark Registration in Greece; Registration of Trade-Marks in the Sudan; Insurance Companies in Chosen; Increase in Patents for Czechoslovakia; New Taxes in Cuba. March 30: Protection of Trade-Marks, Patents, and Copyright in Albania; Trade-Mark Applications in Argentina; Payment of Wages by Check in Argentina; Revision of Income Tax in Iraq. April 6: Accumulation of Property Attached Prior to Bankruptcy in Mexico. April 13: Cuban Statistics on Fire and Automobile Insurance; Quebec Enacts New Mining Legislation; Mining Tax Law on Production of Silver in Mexico Modified; Portugal Adheres to International Trade-Mark Agreement; Increase in Cost of Italian Patent Application. April 20: Chambers of Commerce in Colombia; Cuba to Abrogate Madrid Agreement; Provision for Settlement of American Claims against Government of Panama; Commercial Law Briefs; Federal Labor Code Considered in Mexico; Regulations of Miscellaneous Cuban Taxes; Consignment Laws in the Netherlands; Nicaragua Restricts Employment of Foreigners.

# DEPARTMENT OF CURRENT LEGISLATION

## Old Age Pension Legislation

BY JESSE R. FILLMAN

SINCE last noted in this Journal<sup>1</sup> old age pension legislation in the United States has decidedly progressed, with the result that seventeen states now have statutes on the books. Commissions to investigate the problem and report to the legislatures have been established in other states, and proposed bills were before many legislatures during 1931. In 1930 two old age pension bills were introduced in Congress, and a hearing before the Committee on Labor of the House of Representatives was held in February of that year.<sup>2</sup> One bill provided for a pension from the United States Government not to exceed \$8 a week. The second bill was a federal-aid plan providing for a federal appropriation to be apportioned among the states accepting the provisions of the act.<sup>3</sup> In 1931 a sub-committee of the Senate Committee on Pensions conducted a hearing on a bill<sup>4</sup> providing for an appropriation of ten million dollars as federal aid to states enacting old age pension laws. The Canadian old age pension law<sup>5</sup> is similar to the proposed federal bills in that the Dominion Government pays one-half of the relief paid by any province which adopts the law. Six of the nine Canadian provinces have adopted the law.

Any legislative movement of importance brings forth arguments in support of it and also explanation of its existence. Indorsement and explanation of the old age security movement run the gamut from Christian teachings to economy. The legislators have evidently been persuaded that our industrial order is geared to the speed of a person's most active years and that the weak, though faithful, shoulder to the wheel is no longer wanted and so have reached the conclusion that society should provide for those who have given their best years laboring at some task in that society and can no longer provide for themselves. The poor laws of the various states are antiquated and the lawmakers appear convinced that they do not adequately serve this new movement. In the first place the poor laws of most states are but guide posts to the county almshouses. Except for certain exceptional cases allowing other relief, local authorities must administer outdoor relief or commit the pauper to the poorhouse. The almshouse has been proved to be a very expensive means of caring for the aged.<sup>6</sup> In the second place the existing poor laws do not distinguish between poor persons or between causes of poverty. The almshouse has been described as a "catch-all" institution wherein are housed society's derelicts of every description. Old

age pension legislation is a declaration, much the same as mothers' pension legislation, that all poverty should not necessarily be treated alike irrespective of cause, and that poverty caused by unemployment and other disabilities concomitant with old age can be relieved with more humanity and economy if treated separately.<sup>7</sup>

There are three plans for securing the necessary funds for old age relief legislation. The first places the burden entirely on the counties, cities or towns; the second divides the burden between the counties, cities or towns and the state; the third, operative only in Delaware, places the burden entirely upon the state. Eleven states operate under the first plan,<sup>8</sup> five under the second. The state pays one-third in Wisconsin, one-half in New York and California, two-thirds in Massachusetts and three-fourths in New Jersey.

Of the eleven states in which the counties, cities or towns pay the entire relief, the adoption of the plan in six states is optional because the statutes simply authorize the counties to grant old age relief.<sup>9</sup> These optional statutes do not insure the payment of old age pensions. For example, the Kentucky law was passed in 1926; in 1928 no county had accepted the provisions of the law. The Nevada law is apparently practically inoperative. On the other hand, the Utah optional law is in active operation. The Utah bill became effective in May, 1929, and by March, 1930, fifteen of the state's twenty-nine counties had accepted it. In the remaining five states operating under the first plan the laws are mandatory upon the counties, cities or towns. Under the second plan the adoption by the counties, cities or towns is mandatory in New York, California, Massachusetts, and New Jersey, and optional in Wisconsin.<sup>10</sup> The Wisconsin law is apparently effective.

The source of the local contribution to old age pensions is usually a tax upon property. The state contributions, where the statutes provide for them, are usually made from general funds of the state. New Jersey, however, has designated the state inheritance taxes as the source of the funds. A plan to put a special tax on bottled beverages, except milk, in Massachusetts encountered opposition and had to be abandoned. Special tax legislation is

7. There are, of course, other existing securities, such as industrial pension systems, pensions for public employees, teachers, and soldiers, fraternal and trade union benefits, etc., which are not believed to be adequate protection against the poverty of the aged. See, for a summary of them Epstein, *op. cit. supra*, note 2, p. 149 et seq.

8. Colorado, Idaho, Kentucky, Maryland, Minnesota, Montana, Nevada, New Hampshire, West Virginia, Wyoming, and Utah.

9. Kentucky, Maryland, Minnesota, Nevada, West Virginia, Utah. The author was under the impression that the 1931 Idaho bill was mandatory. However, Attorney General M. H. Greene of Idaho has ruled that the law is not mandatory. The Attorney General's opinion is not shared by the State Commissioner of Public Welfare, Mr. Lewis Williams. *United States Daily*, May 18, 1931, p. 5.

10. The Wisconsin legislature has adopted a bill which the Governor will probably sign, making the law compulsory on the counties after July 1, 1933.

1. 10 Amer. Bar Assoc. Jour. 100 (1923).

2. H. R. 6875, Cong. Connery of Massachusetts; H. R. 1199 Cong. Sirovich of New York.

3. A discussion of the constitutionality of federal aid pension legislation appears at page 76 of the printed hearings upon these bills.

4. Senate No. 2357, Senator Dill of Washington.

5. Act of March 21, 1927, 17 George V. Ch. 35.

6. Epstein, *The Challenge of the Aged* (1928) p. 213 et seq.

contrary to the principle of budget laws so widely adopted in this country.

Where there is no state aid, a local authority makes investigation and decides finally on claims for allowances. Where the state pays part of the allowance, there is a varying degree of control by state officials of the action of local boards. Wisconsin is an exception. The county judge passes on claims, but the County Board of Control may reduce or discontinue the allowance in any individual case. New York, New Jersey, Massachusetts and California incorporate their administrative machine in existing state agencies. New York set up a Division of Old Age Relief in the State Department of Public Welfare. New Jersey has created a new division in the State Department of Institutions and Agencies, and California has established a new division in the State Department of Social Welfare. In Massachusetts the State Department of Public Welfare has general supervision of the law. The state officials serve two purposes. Under their supervisory powers they protect the state against too great freedom by the county authorities in granting relief. They also secure a degree of uniformity in administration. These objects are accomplished by their right to make rules effective throughout the state, and their right of review of cases passed on by the county authorities. The local agencies are for the most part those which already have general supervision of the poor laws: boards of county commissioners, judges of county courts, or, as in New York, district public welfare officials. In California there is an advisory board of citizens appointed in each county by the Chief of the State Division, to advise the Board of Supervisors who are the local body responsible for the law.

The Delaware law has set up an entirely new state commission which has complete control of the administration of the law. In the Diamond State the Governor appoints a commission of four for overlapping terms, and all subsequent appointments are made by the Chief Justice for four-year terms, so that the Board is as well insulated from politics as is possible in an American state. There is no local administration. The state commission fixes, once for all, the amount of individual allowances.

In other states an application for an old age pension is made through the local administrative agency which conducts an investigation of the applicant's circumstances, which may be accompanied by a hearing. The agencies, or persons designated by them, are usually given power to compel attendance and production of books and papers. In eight states where there is no state contribution the disposition of the application made by the local agencies is final.<sup>11</sup> In Idaho the applicant may have a hearing before the probate judge and the board of county commissioners, if he desires to appeal from their first informal action. In West Virginia appeal may be taken from county commissioners to the circuit court of the county; in Nevada an appeal lies from the county commissioners to the district court; while in Wisconsin the appeal is to the county board of control from the decision of the county judge. In New York, New Jersey, and California, where state aid is given, appeals

from the local authorities to the state agencies are allowed, and decisions upon such reviews are final. The state agencies may refuse the application, decrease or increase the amount, thus assuring that the state shall not contribute to excessive allowances, and that the applicant shall be protected in securing his full rights under the law against a too strong desire on the part of local authorities to protect the county treasury. In Massachusetts the state agency has general supervision of the law, and close control over the town boards of public welfare which administer the act. In statutes allowing review by the state agency the rules of procedure are generally prescribed by those agencies and are binding upon the inferior agencies. The Maryland law also provides that the State Board of State Aid and Charities shall make binding procedural rules, although it has no power to review the decision made below, and although the state makes no contribution.

Old age pension legislation is class legislation, and the determination of the class is effected by a series of necessary qualifications and exclusionary disqualifications. No statute distinguishes between the sexes. The first important qualification is that of age. Nine statutes require the applicant to be 70 years of age; eight require only 65 years. If any prediction may be made, it is that the age requirements will be reduced. Colorado reduced the requirement this year from 70 to 65. Five amendments to reduce the age requirement in New York and four such amendments in Massachusetts were introduced this year. The alleged industrial policy of discrimination against workers between 45 and 60 may be one of the reasons for the desire to reduce the age requirements.

A second important qualification for relief under old age statutes involves citizenship and residence. Fourteen of the statutes require fifteen years of citizenship before application for assistance may be made. The fact that strict citizenship requirements deprive of relief deserving aliens or deserving persons who have recently become citizens, probably accounts for the lessened requirements in three recent statutes. The statutes of New York and Massachusetts require the mere fact of citizenship. The Delaware law contains only a residence requirement, 15 years in the United States and five in Delaware. The laws of all the other states have residence requirements ranging from 10 to 20 years in the state, with exceptions for temporary absences, and from one to fifteen years in the county or district where application for relief is made. Recent laws have reduced the residence requirements in the counties or districts.<sup>12</sup>

The first important disqualifications to be noticed relate to the ability of the applicant to support himself, either because he has sufficient income, or property which should yield a sufficient income, or because someone else is responsible for his support. An income of \$1 a day disqualifies an applicant in six states;<sup>13</sup> \$300 a year in four states;<sup>14</sup> \$360 a year in Wyoming, and \$400 in Kentucky. New York, New Hampshire and New Jersey require that the applicant be unable to sup-

12. New York, California, and New Jersey, require one year; Idaho requires three. Nevada apparently has only a state residence requirement of ten years.

13. California, Colorado, Maryland, Minnesota, Nevada, and Wisconsin.

14. Delaware, Idaho, Montana, Utah.

11. Colorado, Maryland, Minnesota, Montana, New Hampshire, Kentucky, Utah, and Wyoming.

port himself in whole or in part. In West Virginia the applicant must be unable to support himself, and in Massachusetts the applicant must be in need of relief or support. In all the statutes there are provisions which include in the applicant's income a certain per cent of the value of his unproductive property, generally 3 or 5 per cent. The computation of income from unproductive real estate is apparently made upon the basis of the applicant's equity in the property. In the administration of the Canadian law the income from liquid assets is determined by ascertaining the Dominion annuity which the applicant could purchase. Nine states consider that the possession of property of values ranging from \$2,000 to \$3,000 indicates that the applicant is capable of supporting himself, and therefore not in need of a pension.<sup>15</sup> Many old age pension laws provide that if the proper agency deems it necessary for the protection of the state or county it may require as a condition to the grant or continuance of relief that all or any part of the property of the applicant be transferred to the agency and managed by it for the benefit of the applicant. The administrative agencies are probably not very anxious to enter into the real estate or investment business by requiring numerous transfers under these provisions. Many statutes also provide that upon the death of an applicant the state shall have a claim against the estate of the deceased, for the amount of assistance which has been granted. All the present laws provide that an applicant is not qualified for relief if there is a child or other person legally responsible for his support. This disqualification has been criticized as placing a heavy burden on the younger generation in many families, but the criticism has not as yet effected a change in any existing state law.

The following further disqualifications are common in old age pension laws of the states:

If the applicant

- (1) is an inmate of a charitable or penal institution.
- (2) has deprived himself of property in order to qualify for the relief.
- (3) has been convicted of a felony (or indictable misdemeanor) during the last ten years before his application.
- (4) has been a professional tramp or beggar within the last year.
- (5) has deserted his wife and children during a certain period before his application.
- (6) is receiving other aid from the state, except medical or surgical relief.

The certificates entitling an applicant to relief are generally good for one year, and since they must be renewed for each subsequent year, the applicant may find himself disqualified if his circumstances have changed. Likewise, during the course of the year the relief may be discontinued if certain of the disqualifications have come into existence or if the applicant has improperly obtained the relief in the first place. Most of the laws prescribe penalties for fraudulently obtaining relief or for aiding and abetting anyone to obtain relief by fraud. In most of the statutes the relief is given protection by making it inalienable, exempt from tax levy

and other process, and by providing that it shall not pass to a trustee in bankruptcy or to a trustee acting on behalf of the aged person's creditors.

Doubt of the constitutionality of old age pension legislation has greatly affected the form of legislation in many states. The provision in the Pennsylvania Constitution under which the old age pension act of that state was declared invalid<sup>16</sup> is typical of the constitutional obstacles to granting pensions except to those who can qualify as poor persons under the poor laws. It prohibits appropriations, except pensions or gratuities for military services, for "charitable, education or benevolent purposes, to any person or community."<sup>17</sup> Another section prevents the General Assembly from authorizing the counties and other political subdivisions of the state to make similar appropriations.<sup>18</sup> Similar provisions appear in other constitutions.<sup>19</sup> In states having such constitutional provisions these limitations do not apply to the poor laws. The old age pension statute with a property disqualification as high as \$2,000 and an income disqualification beginning as high as \$360 a year may not qualify as a poor law, and hence escape the constitutional prohibitions.<sup>20</sup> There are two ways out of this difficulty. The constitution may be amended,<sup>21</sup> or the objectionable features may be removed from the law. The latter is accomplished by drafting the law so that it will be applicable only to those who can qualify for relief as poor persons, and omitting any property qualification. Such legislation, however, accomplishes two desirable results. It provides for special attention for the deserving aged as a special class, and it regularizes the giving of relief to them outside the almshouse.

Another constitutional objection was encountered in New Hampshire when the old age pension law of that state was held to violate the constitutional provision in regard to separation of powers because the judges of the probate courts were given administrative duties.<sup>22</sup> A number of other statutes use county judges in an administrative capacity,<sup>23</sup> but no constitutional difficulty is presented, as those judges have other similar powers in county affairs.

The old age pension movement is making rapid progress and promises to be, if it is not already, an effective expression of a significant social consciousness on the part of the people of the United States.<sup>24</sup>

16. *Busser v. Snyder*, 282 Pa. 440, 128 Atl. 80 (1925).

17. Pa. Const. Art. 3 § 116.

18. Pa. Const. Art. 9 § 7.

19. Missouri Const. Art. IV § 46; Florida Const. Art. 9 § 10.

20. *Busser v. Snyder*, *Supra* note 7. See *In re Walker*, ND, 193 N. W. 250 (1922), in which a mothers' pension law was said not be a poor law. But cf. *In re Opinion of the Justices*, 154 Atl. (N. H.) 217 (1931), in which an old age pension law was thought to be valid as a poor law in spite of the property provision, though declared invalid for another reason. See footnote 23 *infra*.

21. An amendment to Art. 3 § 116 was passed by the Pennsylvania legislature this year. S. B. 22. An amendment to Art. 9 § 7 has been offered. Senate Amendment No. 257. The Missouri legislature has before it a resolution to submit an amendment to the voters. H. R. 1.

22. *In re Opinion of the Justices*, 154 Atl. (N. H.) 217 (1931).

23. West Virginia, Colorado, Kentucky, Wisconsin, Maryland. The new Idaho law directs the probate judge to pass upon the application in the first instance.

24. Citations to laws are as follows: California, Ch. 520 (1929); Colorado, Ch. 143 (1927); Delaware, H. B. 28 (1931); Idaho, Ch. 16 (1931); Kentucky, Carroll's Ky. Stats. 1930, 1938-1; Maryland, Ch. 537 (1927); Massachusetts, Ch. 408 (1930); Minnesota, Ch. 47 (1929); Montana, Ch. 73 (1925); Nevada, Ch. 121 (1925); New Hampshire, S. B. 3 (1931); New Jersey, Ch. 219 (1931); New York, Ch. 257 (1930); Utah, Ch. 78 (1929); West Virginia, S. B. 4 (1931); Wisconsin, Ch. 49.20 (1929); Wyoming, Ch. 87 (1929).

15. Colorado, Nevada, Maryland, Minnesota, Wisconsin, California, and New Jersey—\$3,000; Kentucky—\$2,500; New Hampshire—\$2,000. In those states which are in italics the applicant is disqualified if married and the property of both husband and wife together equals the statutory figure.

# CORPORATE FIDUCIARIES AND LEGAL ETHICS

Duties of Lawyers in Their Dealings With Corporate Fiduciaries—Revolutionary Changes in Trust Business Relations and Absence of Publicly Acknowledged Standards Called for by New Developments—Need of Disinterested Advice to Prospective Will-makers—Should Corporate Fiduciaries Be Subjected to Same Rules That Restrain Lawyers From Soliciting Business?\*

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**M**R. PRESIDENT: Members of the Association of the Bar: At its last annual meeting the American Bar Association appointed a special committee on the subject of the unauthorized practice of the law. In bringing their duties to the attention of local and state bar associations, the committee said that the "sole inducement" to corporations and laymen to encroach upon the practice of the law, and to do law business "is the compensation derived therefrom." . . . "To secure this legal business, recourse is had to the ordinary commercial methods of advertising and solicitation, thereby commercializing the profession of the law, undermining ethical and professional standards, and destroying public confidence in lawyers and the courts. A loss of confidence in lawyers and the courts is a sign of governmental decline and a forerunner of disintegration."

In the light of this call by the organized bar of the whole country, I think the time is opportune for a dispassionate consideration of the methods of trust companies and their lawyers of developing, through advertising and high pressure salesmanship, the creation of trust estates by wills and trust deeds.

The subject of my address should be one of interest to the bar, to trust companies, and to the public. The question is controversial, occasioned by the development and growth of trust business. It is not my purpose, however, to become disputatious, but rather to state what may be in the minds of some of the members of the bar and some of the executives of corporate fiduciaries.

Within our lifetime has come a change in trust business relations which may be termed revolutionary, altering control of, and creating new and unheard of avenues for trust business. So fast has been the growth and development of trust business that business ethics affecting it have not been adequately considered. The effect of this whirlpool of new ways and new activities in trust affairs has, for the time being at least, submerged ethical ideas in dealing with the serious and almost sacred subject of the family fortune. Publicly acknowledged standards have not been set up by trust business interests, nor by the law of the State.

The law of the State has created these corporations with powers to act as executor, administrator and trustee, in fact, in every fiduciary capacity, without the lawmakers expecting that the privilege to do these corporate acts would be heralded by

the corporations in a maudlin manner. The State failed to give adequate consideration to the situation which it permitted to be created. The business of selling merchandise is one thing; the creation of trust relationships is quite another. One relates to business. The other is a confidential relationship and service which is intensely personal. The trust company is properly charged with a public service. *Matter of Jackson*, 138 Misc. 167; *Matter of Clark*, 136 Misc. 881.

On the other hand, the question of the corporate practice of the law has for some years been before the courts of the several states. Laws in our State have been passed tending to control and regulate the practice of law by trust companies. In *Matter of Co-operative Law Co.*, 198 N. Y. 479, it was decided that the right to practice law is not open to all, but is a special franchise granted by the State to those who qualify by education and character. An attorney must take an oath of office and become an officer of the court, subject to its discipline.

The legislation of the State has placed the stamp of disapproval upon the practice of law by corporations, as evidenced by Section 280 of the Penal Code. It has made it illegal for such corporations to furnish legal service or advice, or to furnish attorneys or counsel, or to render legal service of any kind or nature in any other way or manner.

Some corporate fiduciaries, when approached by a will-maker, now direct such persons to certain attorneys as persons qualified by experience to undertake the labor of preparing a will containing trust provisions. What should be the duty of lawyers in their relations with clients sent to them in this manner? Is the public adequately protected if the attorney who draws a will or trust investment for the bank's customer is one who either is employed by the bank, or systematically profits through its solicitation for the creation of such trust relationships? Is not the lawyer's allegiance a divided one? Does he not undertake an impossible task when he attempts to represent and advise the will-maker? No man can serve two masters. If the lawyer owes any duty to the bank, how can he impartially serve the bank's customer as his lawyer?

When the corporate fiduciary sends the customer to a lawyer and advises the customer that the lawyer is competent to draft the instrument, and, particularly, where such event happens with frequency, those who appreciate human emotions will say that the lawyer must be interested in having the corporate fiduciary named in the will as

\*Address delivered at the House of the Bar Association of the City of New York on Thursday evening, April 23.

executor. I know of a case where the will-maker wanted one of the family named as executor and the attorney talked the will-maker into writing in the name of his trust company. Whom did this attorney really represent—the corporate fiduciary or the will-maker?

The real question is one in which the public interest is involved and that interest should be paramount. If the estate is large, or the matter complicated, the proper drafting of a will requires the highest degree of legal skill. But, to the skill of the advising lawyer must be added a quality of vital importance. The lawyer in such cases must be absolutely clear of any adverse interest, or even the taint of one. The prospective testator has the right to expect that the lawyer, who is advising him as respects what is probably the most sacred and the most far-reaching legal act of his life, shall be acting solely in the interest of the will-maker. Our statute law is careful to surround the execution of such a document with certainty of disinterestedness; even one who performs the service of witnessing a will is barred from accepting a gift therein. If a mere witness must be disinterested, how much more important it is that the trusted counsellor, whose advice is confidentially and trustingly followed, should be disinterested. The relationship demands absolute mutual confidence and reliance.

The circumstances of each individual testator require different treatment. In some cases, it is advisable that property should be left outright rather than upon trust. The will-maker is entitled to honest and disinterested legal advice upon this point. With a divided interest, will the lawyer decide for the testator, or for the trust company which might receive large commissions as trustee?

Illustrations of this conflicting interest are numerous. Under our laws, an executor receives statutory commissions. If the estate is under a certain size, and there are two executors and more, the one commission is divided. If the estate is over \$100,000, each executor, if there are not more than three, receives a full commission. The size of commissions to executors and trustees has become in our State alarmingly large. If the will-maker of an estate of over \$100,000 is informed that he must pay two commissions if he names two executors, and that either the individual executor, or the trust company executor, must be deleted, whom will the interested lawyer advise to be cut off?

It may be of passing interest to know that, during the last four years in my Court, the fees of attorneys have been 1.04 per cent of the gross estates, while the commissions of executors and trustees have been 2.04 per cent of the gross estates.

Provisions in wills may be so drafted as to compel the courts to deny double commissions. *Matter of Abrahams*, 136 Misc. 538. If drawn otherwise, a double commission is inevitable. How will this disinterested attorney draft the will? Will he advise the customer fully on the intricacies of the law of commissions?

The question may arise with regard to the insertion of a power of sale clause. Commissions from real estate are not allowable to executors unless a sale of real estate is made, or the increment thereof received, distributed, or delivered. A power of sale affecting all real estate might be inadvisable. A corporate fiduciary might be lured into the exer-

cise of such a power with the subconscious thought of securing additional commissions. Under the new Decedent Estate Law, if a will lacks a power of sale, the right to sell the real estate may be secured upon application to the court in a proceeding for that purpose, with all parties cited. The court would undoubtedly limit the sale of real estate to such parcels as might be necessary to meet the needs and conditions of the estate. I can imagine estates where an unlimited power of sale should not be given to any executor or trustee. In such cases, how would a will drafter arrive at his decision and be faithful to the trust company and the customer, both at the same time?

Again, a trust of short duration may be more desirable than one which is to endure for many years. The longer the trust lasts, of course, the longer the trustee gets commissions. Can such a lawyer for the trust company, or under obligation to it, be relied upon to advise a short rather than a long trust, when he knows that the corporate fiduciary will derive greater financial profit from the latter?

The powers of a trustee are defined in the will. In some cases, these powers should be broad. In others, they should be limited. It is a distinct and obvious advantage to corporate fiduciaries that they be given the fullest possible powers. Where does the interest of the trust company attorney lie in answering this problem?

Can we be sure that, when a trust company distributes advertising material and solicits the insertion of certain provisions in wills or trust indentures, a lawyer regularly recommended by it to customers will refuse to insert such provisions in wills?

In accountings in one or two large estates, special guardians reported to me that they found the securities of the estate or the trust standing in the names of dummy nominees of the executors or the trustees of the trusts. The court immediately directed that the securities be changed back to the proper ownership. To overcome my ruling, and a similar ruling of Surrogate Foley of your County, some trust companies advise the public to place the following clause in the will:

"The trustee may in its sole discretion cause the securities which may, from time to time, comprise the trust fund or any part thereof, to be registered in its name as trustee hereunder, *or in its own name, or in the name of its nominee*, or may take and keep them unregistered, and may retain them or any part thereof in such condition that they will pass by delivery."

I have heretofore characterized such provisions as entirely unethical, vicious and tricky. Will-makers must be protected from this kind of advice. Any trust company, or any lawyer, who gives such advice should lose the confidence of the public.

Wills are drawn to provide that the trustee shall only be liable for gross neglect, or other actual malfeasance, thus freeing the trustees from many of the responsibilities which the law would otherwise place upon them. A clause along this line, protracted to the limit, will be found in Judge Foley's opinion in *Matter of Knower*, 121 Misc. 208.

Can the company-chosen lawyer advise the testator disinterestedly as to the character of the provisions which relieve the fiduciary corporation

from pecuniary liability in the event of loss accruing from the negligence of a trustee?

Other illustrations of conflict in interest could be cited to indicate that, in the drafting of a will, the interest of a testator and of the financial institution which is to become the executor or trustee, or both, are in opposition, and sometimes conflicting to a marked degree.

It has been claimed by expectant executors, and the contention has been sustained by the courts, that the right to remuneration to statutory commissions running to an executor creates an incomplete interest in the estate. While the right to receive the commissions is not vested, it is inchoate, and, as long as the will is in existence and the fiduciary corporation is named therein as the executor, the property right exists. *Matter of Bergdorf*, 206 N. Y. 309, 317.

If the will-maker's name is on the dotted line and the company is named as executor, the goal is half reached.

The lawyer who is used systematically feels subconsciously that it is his job by indirection, by loyalty to the trust company, to see that no clauses appear in the will that are objectionable to the trust company. In fact, his loyalty must lead him to see to it that the clauses in the will are in the interest of the trust company.

Upon the clearest ground, the mere possibility of such an adverse interest should bar the lawyer who has had contacts of this kind with the trust company from advising as to the contents of the will, or from drafting the same.

The question is not one of ability to draw documents. The issue is one of disinterestedness. Has the attorney independence of judgment? Is he what the will-maker believes him to be? Can he be such when affected with such an interest? Candidly, in such situations I do not believe he can be wholly free.

For purposes of illustration in discussing this subject, I have referred to drafting of wills. The same objection, of course, will apply with equal force to the drafting of living trusts, life insurance trusts, or any other trust agreement of like character.

The corporate fiduciary business involves the fiduciary principle. There is not adequate protection to the community in the practice of selecting counsel for those who have been solicited by the activities of the trust company.

How is this business procured?

It is common knowledge that many banks and trust companies have been, and are, advertising for and soliciting the business of acting as executors, administrators, trustees, and other fiduciary relationships, by means of pamphlets, newspapers, personal and circular letters and personal solicitation.

The competition for trust business is so keen that high-pressure advertising and solicitation result. I oftentimes wonder whether the executors of corporate fiduciaries really are aware of the methods that are used, and the practices employed in this field of competition. The extensive business of acting as executor of wills and trustee under trust indentures is a recent growth, and the application of modern methods of advertising and salesmanship has developed only in the last few years.

With this newness of business, there is no code of ethics controlling, such as controls the legal profession. There is yet a failure among the fiduciaries themselves to appreciate that, in the creation of the fiduciary relationship, there are involved considerations transcending ordinary business standards. Canons of ethics by which lawyers are bound are not based upon arbitrary traditions. Lawyers are precluded from advertising and solicitation of professional employment, because it has been found that, in the creation of fiduciary relationships by such methods, there are inherent dangers to the community.

At least some of the corporate fiduciaries have persons who are called "solicitors," employed on salaries, who personally visit customers and prospective customers and solicit them to make wills, create trusts, and to name their respective companies as executor and trustee in wills and trust instruments. Other companies do not employ such persons but depend upon printed pamphlets, documents, and letters, as well as newspaper advertising, to get the business of handling estates. We all receive such appeals through the mail. These solicitors consider themselves as though they were life insurance agents who go out to solicit and write up policies for their companies. Yet, in the case of life insurance, the transaction is one that will, in many cases, augment the estate. The other transaction deals with a more sacred privilege, to be carried out after death. Getting on the "prospective list" is almost similar to getting on the usual "sucker list." As with all salesmen, there is a high-powered kind who brings in business with a disregard of what he may say. He is the "go-getter" type. In my judgment, all of this sounds unseemly and highly improper. The booklets are of the "scare" type, very much akin to patent medicine advertising, after reading which, you almost believe you have the disease.

Of course, there is no mention made in pamphlets or advertisements of the desirability of the customer having the undivided advice of an attorney. Sometimes a pamphlet is distributed where reference is made to intestate property, containing paragraphs indicating great doubt as to whether the State law should be allowed to operate in the matter. The indirect suggestion is to have a will made.

And then again, a company will send out pamphlets "Why make a will?" This is the indirect way of suggesting that it is wise to create a voluntary trust or a life insurance trust.

Many persons delay making wills. They have the old-fashioned idea that writing wills presupposes early death, and the tendency of all this kind of advertising and solicitation is approach to the fear side of the mortal being. When a prospect has reached that state of mind, then, of course, the question is asked, "Do you not think our company is your logical executor or trustee?" Some companies have gone so far as to say: "Make your will now and make it right, or your widow will be robbed."

A corporation is an inanimate person, but not so when judged by self-praise. Scientific solicitation told with glowing glee and with a wealth of self-admiration as an evidence of the ability of solicitors to corral the "prospect" is featured in the

printed proceedings of the Trust Development Conference for 1929.

I quote from addresses of officers and employees of corporate fiduciaries at such Conference. One vice-president said: "So that, instead of a staff of a few salaried employees to follow up such prospects as may be obtained among our friends and clients or by advertising or circular letters, we have hundreds of unpaid underwriters engaged daily in locating prospects who have need of our services and bringing them into contact with us."

Speaking to the subject, "Getting Results," the speaker said: "In addition to names developed through inquiries from newspaper advertising, there are numerous sources to which we may go for the building up of our prospect files. In selling trust service the bank has two lines of procedure which lead to two types of selling—'offensive' and 'defensive.' 'Offensive' selling is to the new customer. 'Defensive' selling is to the present customer. The latter is of prime importance and deserves prompt attention in the building of the central prospect files, because it represents the field of least resistance to trust sales efforts.

"For 'defensive' selling immediate reference should be made to the Central Information files and a survey made to determine into which of the three groups you will place customers of departments, other than the Trust Department. Individuals are naturally the first considered and classified. Firms, corporations and partnerships should next be broken down to make prospects of their individual members. The importance of an early development and set-up of present customers can best be emphasized by considering the fact that your 'defensive' field is the 'offensive' field for your competitor—just as your 'offensive' field is his 'defensive.' In your 'defensive' field, relationships are already established and the first personal contact is already made which gives this field a decided advantage when it comes to the final step—personal contact and closing."

"Continuity is essential to the success of a mail program. The prospect should be followed at intervals with letters and circulars. Each letter or circular should contain a direct invitation to send for a representative or a special booklet. The pulling power of each letter or circular should be recorded in order to determine its value. A letter or circular which does not get results should be discarded, and one of known pulling power substituted."

"Proper filing of the prospect will enable you to trace the business as to its original source, and to ascertain the business developed by advertising, direct mail, personal solicitation or combinations of these agencies. Such a report is invaluable to the advertising department, in order to bring out such tangible results as will enable that department to plan its newspaper and mail material."

Again, speaking to "Advertising," another gentleman said: "Toward the end of December, 1928, a small folder with a front-page caption, **RESOLVED THAT MY FIRST ACT OF THE NEW YEAR WILL BE TO MAKE A WILL** was mailed to a list of approximately 19,000 depositors and prospects. More than 700 coupons,

requesting our WILL MEMORANDUM were returned.

"Early in January two of these requests were turned over to a Trust New Business Representative for personal follow-up. In April, 1929, the first of these two cases resulted in the completion of a will, in which we are named co-executor and co-trustee, of an estate of \$1,500,000. The following month the name on the other coupon was transferred to our completed business ledger, with a will approximating \$2,500,000 in which we likewise were named co-executor and co-trustee.

"Thus a total of \$4,000,000 in trust business resulted from two of these 700 return coupons within a period of four months."

"I am reproducing this trust advertisement (by slide) because it has a particularly interesting history. There was quite an interesting discussion of the copy before we released this advertisement. Some people thought it too long—that it would not be read. But we finally decided to give it a fair trial. It appeared in the New York Times and this is what happened.

"The morning it was inserted a gentleman who had had no previous connection with the bank came into the office of our Insurance Trust officer carrying a copy of the advertisement torn from his morning paper.

"His interview was later reported to me in brief by our Insurance Trust officer as follows:

"This man, Mr. —, came into my office this morning. He stated that he had concluded to have his will drawn and appoint his own trust company executor-trustee. He read our advertisement on the way to his office and decided then and there that we knew more about his trust business than his own bank and he is now with his lawyer signing up. His estate will total well over \$500,000."

He concluded by saying: "Now, ladies and gentlemen, that concludes my small part in the program."

In another talk at the Conference, the speaker said: "In one of the 'come-on' circulars prepared by the Manager of our Advertising Department, the first page contains these two questions:

1. 'Do You Know Where You Stand?'
2. 'Has Anyone Ever Shown You a Comprehensive Estate Plan Fitted to Your Individual Requirements and Circumstances?'

"We believe that these two questions suggest the basic ideas for the approach to estate analysis service problems. We believe that the prospect should react favorably to these two questions because they appeal to his business judgment and common sense."

May it not be said that such acts referred to are on a level with the much-condemned ambulance chasing?

Some trust companies use their women employees or officers to address women's clubs upon the desirability and availability of their companies with regard to trust relationships.

Now let us turn to the lawyer. What principle is involved? It is the simple one that one cannot serve two masters. There can be no divided allegiance upon the part of the lawyer drawing fiduciary papers.

I am reliably informed that there are corporate fiduciaries in this City who adhere to the rule that their own attorneys shall not be employed by the

prospective customer in such cases, and their policy and practice are against their own attorneys preparing wills and trust instruments; and they refuse to accept such trust business. In fact, I am told that there is at least one fiduciary corporation who will not even discuss with the layman, without his lawyer, the preparation of any trust relationship. Why should this not be the rule instead of the exception?

Whenever a fiduciary corporation undertakes systematically to refer such business to the same lawyer or lawyers, ethically it should be treated as a solicitation for business by indirection. Such reference to attorneys in itself should disqualify a lawyer systematically so used from acting in the preparation of trust documents wherein the referring bank or trust company is to be named in the will or trust indenture. Where a lawyer is systematically used for the purpose of facilitating the trust company in creating these fiduciary relationships, of course, he benefits by the advertising and solicitation of the company. He is particeps in the whole game. Employment under such circumstances must be condemned as unethical.

It creates a situation of inconsistent fidelity and duty on the part of the lawyer, and he is shorn of the freedom to give his client independent advice. He is influenced by a duality of control, faith and loyalty. On the other hand, the prospective testator has the right to expect that his lawyer shall be acting solely in his interest.

The draftsman of the will should be in fact a disinterested attorney, with only the interest of his client and the public to serve. On the other hand, the public should understand that the relationship is fiduciary in character. I feel that the public fails to understand and appreciate this situation. The general public fully believes now that, as when the will-maker makes payment of a fee for the drawing of the instrument to a lawyer, the attorney is working solely for him as a client.

George W. Alger, in a recent number of the Atlantic Monthly, with regard to the failure of those who are in the relationship of trusts to appreciate adequately their responsibility, said:

"The rules laid down by the courts involving trust relations are based upon a judicial realization that a position of trust exposes its occupant to special temptation which can best be overcome if the law forbids certain acts from which temptations might otherwise arrive."

For years the courts have laid down the old rule of fiduciary relations in plain language. The law is keenly alive to this influence of self-interest. Yet there has been a failure to appreciate the application of this old principle in these new and modern situations.

In *People v. People's Trust Company*, 180 A. D. 494, the court re-stated the principle that the relations of attorney and client are confidential and fiduciary, and an attorney owes undivided loyalty to his client, unhampered by obligations to any other employer.

Consideration of this question brings up the thought that there should be official professional announcement concerning the practice of lawyers systematically recommended by trust companies for drafting trust instruments. The practical result of permitting such practice to continue is to bring such trust business into the hands of a few lawyers

who are picked out and recommended by corporate fiduciaries. It is only a matter of time when the bulk of lawyers will be wholly eliminated from this field of professional employment.

It was reported at the recent meeting of the Trust Company Division of the American Bankers Association that the survey shows that trust companies and banks were nominated executor or trustee under 48,812 wills in 1930 as compared with 36,193 wills in 1929, which represents an increase of 35 per cent. The hearers were reminded that this percentage of increase was precisely the same as that of 1929 over 1928. Is this in the interest of the public?

The bar is now governed by canons of ethics, but how long will these last if highly respected members are left free to serve two masters, while the less fortunate are held to the strict words of the professional code of ethics? We are rapidly approaching the point where we must choose between rules for all of us, or no rules at all.

It need hardly be said that no criticism is made, or intended to be made, of the selection of corporate fiduciaries instead of sole individual trustees. Fiduciaries in this State are expressly authorized by statute to engage in this line of business. They have as much right, therefore, to engage in this business as lawyers have to practice law. Lawyers frequently recommend to their clients the selection of corporate trustees. My reference tonight is not to their legitimate field of activity, but to practices which go beyond this field.

There is no doubt that it is the disposition of most of the corporate fiduciaries to comply with the present statute law, and they disclaim any desire to draw wills or other legal documents, or to give any legal advice, or to furnish their own counsel for that purpose. But this is not enough.

In some states, drastic restrictive statutes have been enacted with regard to restrictions of right to accept or execute trusts, which give the court the power to revoke the appointment and to remove the corporation as such executor.

The question is asked: What is to become of the oldtime relation of confidence and esteem between counsel and client, if the most solemn act of life shall be dealt in as merchandise? Formerly, a lawyer was the trusted advisor and friend, the holder of the family secrets. Is the relationship to become mechanical? Are clerks or mere employees of trust companies or banks to guide in these highly personal situations? Of what avail a bar of men governed by canons of ethics if, in this field, the whole relationship is based on business standards?

Advertisements that no fees will be charged for the service of advice is a powerful appeal to the layman who believes he is getting something for nothing.

The public is not aware of the extent to which courts and bar associations have gone to preserve the integrity of the profession, and to maintain professional standards of honor as distinguished from business standards. If the present business practices of the corporate fiduciaries are not curbed, they will ultimately destroy the professional concept of what is essential for protection to the public. The practice of law is not a business. If the present code of ethics affecting lawyers is not broad enough to reach the case of the lawyer who

solicits for trust companies, or who is a party benefiting by it, then it is my belief that the canons of ethics might well be amended to cover these practices. If they are not condemned, then why not leave all lawyers free to advertise and solicit? Why prohibit that being done directly if we are to permit it to be done by indirection?

When the establishment of the relation with an incorporated institution engaged in other financial transactions is prompted by the primary desire to earn the commissions attached to the office from the business attracted by advertising, persistent solicitation, and keen competition, there is an obvious danger that the interests of the real parties in the transaction may be overlooked or neglected. This is particularly true when the advertisements are prepared by publicity agents, and the business is attracted by the personal solicitation of paid runners and conducted by employees, none of whom are familiar with the principles of fiduciary law. It might result in imposition upon those who, themselves ignorant, are entitled to the application of the strictest principles of fiduciary obligation.

It may be observed that the rule of ethics governing older professions was one of gradual development and, consequently, a rule of ethics governing business relations may be slow of adoption. Professional business has made exceedingly rapid progress within the past few decades and such business relations, bringing up new questions with regard to proper control, give rise to problems which will be solved through careful experience motivated by the highest desire to produce more ethical conditions. Upon a group of professional business people have been conferred the greater opportunity and greater responsibility for effective control.

In an article in the April number of the AMERICAN BAR ASSOCIATION JOURNAL on "The Merchant Ethic," the writer says it is the purpose of the paper "to attract a measure of attention to the very serious consideration which has been directed upon the ethical philosophy of business and to the development of business as a profession. . . . There may be ethics of the merchant no less than of the soldier, the lawyer, and the physician." The writer could have added the professional business interest. In referring to Ethics, he said "it will promote a high order of professional order and efficiency. Responding to the spirit of the law and the influence of the older professions, the merchant ethic professes a discriminating regard for all actual and implied fiduciary relationships."

I rest my views upon the highest considerations of public welfare, and base them upon my experience as a surrogate. My effort has been to lay bare these dangerous symptoms, whether it affects members of my profession or corporate fiduciaries. In so far as it may affect the profession, the remedy is in the hands of the bar associations. In the other case, the remedy lies with the body of corporate fiduciaries. They should adopt rules binding themselves, which will bring about a discontinuance of these objectionable practices of some of them.

I suggest the creation of standards of ethics by trust companies along lines of those followed by honorable members of the legal profession.

In soliciting business as a corporate fiduciary, the bank is seeking to create a relationship to which

the law attaches an obligation of the highest good faith. There must be no bargaining; there must be full disclosure of everything. It is not enough that the property is safely kept by the trust company; that the trust estate is secure from pecuniary loss. Up to the present time, very largely that is the only real factor which is urged by trust companies. What is back of the effort in advertising, soliciting and competition is, of course, the desire, as a matter of business, to secure the commissions attached to the office of executor or trustee. That is just plain business. But there is the inherent danger that, in securing such business by the methods designed, the interest of the man whose estate is to be trustee may be overlooked.

It is in the interest of corporate fiduciaries maintaining high standards of conduct that all corporate fiduciaries should conform to such ethical rules and regulations as will avoid, in any instance, disregard of the fundamental principles governing trust relationships. They should not be subject to such competition. In the case of lawyers, standards have been set up by the bar forbidding the creation of the fiduciary relationship of attorney and client by processes of advertising and solicitation. These rules naturally suggest the question, why not like rules applicable to corporate fiduciaries in the creation of their trust relationships? Since the sole motive of the corporation for the creation of the relationship is one of profit, why should not the advertising or solicitation be confined to the simple statement of fact that the corporate fiduciary is empowered by law to accept and administer trusts; to act as executor, administrator or other fiduciary; and to such statements of financial standing as will guide the proposed testator or donor?

In *Barton against the State Bar of California*, 289 Pacific Reporter, 818, June, 1930, which case had to do with an attorney who had advertised advice free, the court took occasion to say that the rule which prohibits the solicitation of professional employment by advertisement is a reasonable regulation; that such rule was reasonable because it was proposed and promulgated by the members of the profession itself.

The court said: "It is obvious, we think, that the legal profession does stand in a peculiar relation to the public, and that there exists between the members of the profession and those who seek its services a relationship which can in no wise be regarded as analogous to the relationship of a merchant to his customer. . . . It is important to the legal profession as a whole that nothing shall be done by any member which may tend to lessen in any degree the confidence of the public in the fidelity, honesty, and integrity of the profession. And it is by reason of the confidential relationship existing between attorneys and clients that certain rules and regulations are applicable to the profession which are not applicable to a business. . . . It can readily be understood how unfavorably the public would react toward the profession as a whole if there were published large full-page advertisements extolling the learning, ability, and capacity of an attorney 'to get results.' It would be hard to draw the lines as to what was improper and what was proper in advertising, and the regulation by the state bar which prohibits all adver-

(Continued on Page 449)



## Washington Letter

1266 National Press Bldg.,  
Washington, D. C.,  
June 9, 1931.

### Quo Warranto Proceedings Against Chairman of Federal Power Commission

**A**N answer to the quo warranto suit instituted by the Senate to oust George Otis Smith from the Chairmanship of the Federal Power Commission was filed in the Supreme Court of the District of Columbia, May 23, 1931. Honorable George Wharton Pepper appeared on the answer as attorney for Mr. Smith.

The answer alleges that the President was acting "in the discharge of a duty laid upon him by the Constitution," in appointing Mr. Smith to be a member and Chairman of the Federal Power Commission.

The answer alleges:

"(a) That following the announcement by the Presiding Officer of the advice and consent of the Senate to the appointment of the respondent no objection was made by any Senator to the statement of the presiding officer that 'the President will be notified'; and that pursuant to the established practice of the Senate in such cases the statement so made became as if by unanimous consent an order of the Senate to their Secretary.

"(b) That the order of the Senate as aforesaid was thereupon duly recorded in the Executive Journal.

"(c) That the order set forth as follows in the fourth paragraph of the petition: 'Ordered, that all resolutions of confirmation this day agreed to be

forwarded forthwith to the President of the United States,' was announced by the President pro tem, that no Senator objected to the order so announced and that pursuant to the established practice of the Senate in such cases the order so made became as if by unanimous consent an order of the Senate to their Secretary.

"(d) That upon the making of said orders it became and was the duty of the Secretary of the Senate under the rules of the Senate, as interpreted by the established practice of the Senate, forthwith to notify the President that advice and consent had been given to the appointment of the respondent, without awaiting the expiration of the second subsequent day of actual executive session."

The answer "denies that there was pending in the Senate at any time after December 22, 1930, any nomination to the office to which on that date the respondent had been appointed."

The answer "prays the judgment of the Court that Mr. Smith lawfully holds the office of member and chairman of the Federal power Commission and that he be permitted to go hence without day".

### The Department of Justice

In a radio address on May 16, 1931, Attorney General William D. Mitchell stated among other things:

"In the last 25 years we have overloaded our Federal machinery of justice with new duties and activities, and until the Federal courts and the Department of Justice and the other Federal agencies for the detection and prosecution of Federal offenses have been made effectively to discharge the duties they now have, they should not be further burdened by the enactment of new Federal criminal legislation."

The Attorney General called attention to the fact that

"The Department of Justice has charge of all criminal and civil litigation for the United States. Our Bureau of Prisons has charge of Federal penal institutions and the administration of the parole and probation systems. Our Bureau of Investigation is charged with the duty of detecting offenses against a variety of Federal Statutes, and the Bureau of Prohibition performs the same function under the National Prohibition Act.

"The Department also has the administrative work connected with the Federal courts and the offices of United States attorneys, marshals, and clerks of court. The Attorney General is required to give formal legal advice to the President and to the heads of the executive departments, and furnish informal legal assistance to other departments of the Government."

He discussed the reorganization of the Federal prison system, the problem of efficient law enforcement, delays and wasted effort resulting from the congested condition in Federal courts; the transfer from the Treasury Department to the Department of Justice of the prohibition unit; enforcement of the anti-trust laws; the obtaining of information relating to candidates for Judicial office; and the work of condemnation proceedings in the Federal building program. Speaking of other activities of the Department, the Attorney General said:

"At the direction of the President, and with the cooperation of business organizations, commercial agencies, and with assistance from the referees in bankruptcy and clerks of court, a thorough investigation of our bankruptcy system is now being made to develop the reasons for such defects as now exist and enable the President to recommend constructive legislation on this subject. We have under consideration proposed legislation for the adjustment of tort claims against the Government in judicial tribunals instead of by claims committees of the Congress; legislation to provide for payment of interest on judgments and contract claims against the Government; the problem of dealing with the parole or probation of persons sentenced to one year or less not now subject to the parole law; the ques-

tion of extending a civil service law and regulations to a larger number of the employes of the Department, and a multitude of other matters."

#### **Gouverneur Morris Papers Willed to Library of Congress**

The journals, diaries, and correspondence of Gouverneur Morris, distinguished statesman who helped write the Constitution of the United States, have been bequeathed by Alfred P. Maudsley to the Library of Congress, according to an announcement made by Frederick William Ashley, Assistant Librarian.

Consisting of approximately 27 volumes, this collection of information on the times contemporary with the founding of the Republic is expected to contain a wealth of historical data heretofore unexplored by scholars. Because of a condition connected with the bequest, the collection will not be received immediately, but should be in a year or two. Journals covering over 16 years are expected to be of greater interest, because of the intimacy of Morris with the political affairs of the United States at the time of its establishment.

#### **Roman Law Collection of Library of Congress**

The collection of works on Roman Law in the Library of Congress has been considerably increased by the recent acquisition of the private library of Paul Krueger, the distinguished German annotator on Roman Law. The collection, which was bought in Germany, consists of 391 periodical volumes, 800 bound books, 500 unbound books, 3000 monographs and a large assortment of the private manuscripts of Dr. Krueger. There are books on canon law, Greek and Roman literary classics, works in Italian, French, English, Greek and Latin. The collection is rich in various editions of the "Corpus Juris Civilis" (Roman Civil Law), and contains photographic reproductions of a number of fragmentary papyri of historical antiquity containing Roman Law.

#### **Section of Public Utility Law**

Preliminary conferences of members of the various Committees of the Section of Public Utility Law were held in Washington, D. C., May 7, 1931, and all of the Committee Chairmen were present with a large group of members. The scope of each Committee's work and report was informally discussed and the views of those present were elicited.

Either a preliminary or a final report will be expected from each Committee of the Section as an item of the order of business for the Sessions of the Section at the Annual Meeting in Atlantic City.

In a letter to the members of the Section, the Chairman, Mr. William L. Ransom, says:

"The discussions in Washington have emphasized the importance of seeing to it that each preliminary and final report shall be such as to be recognized in the profession as a clear, timely and open-minded formulation on the vital topics discussed. Lucid analyses of the present facts and impressive re-statement of fundamental principles are more needed at this juncture than unrelated arguments for or against particular proposals."

#### **What Public Documents Are and How to Get Them**

The Government of the United States is the greatest of all modern publishers. It employs thousands of scientists, who are engaged the year round

in making researches and investigations in all branches of agriculture and household economy, in geology, in mining, in electricity, in chemistry, in astronomy, in engineering, in aviation, in preventive medicine, in forestry, in irrigation, in shipping and railroad problems, in trade and manufactures. The arts of war as well as those of peace are also actively cultivated. The greatest art of all, that of maintaining and spreading free government, is strenuously carried on by President, Cabinet, Senators, Representatives, Army, and Navy.

The results of all these activities of the most comprehensive and effective organization ever known, are constantly reduced to print and poured out in an incessant flood from the Government Printing Office at Washington, the largest printing plant in the world.

The greater number of these public documents are sold by the Superintendent of Documents, located in the Government Printing Office. The Government did not establish this sales office for purposes of profit, but as a public convenience. The prices charged cover only paper and printing, no charge being made for the services of the statesmen and scientists who are the authors of the various books, pamphlets, periodicals, and maps, nor are commissions allowed for their sale. The documents have the freedom of the mails and are sent without postage.

The main condition of purchase is that payment be made in advance of shipment. The Superintendent of Documents is not authorized to supply free copies of anything except Price Lists. The Price Lists, which are numbered according to the topics covered, describe each available book or pamphlet and give instructions as to how to remit the price of the book or pamphlet desired. The Price Lists which are sent free by the Superintendent of Documents, are as follows:

10. Laws. Federal Statutes and compilations of laws on various subjects. Opinions of the Attorney General, Decisions of Courts.
11. Foods and Cooking. Home economics, household recipes, canning and cold storage.
15. Geological Survey. Covers geology, and water supply.
18. Engineering and Surveying. River, harbors, tides, magnetism, triangulation.
19. Army and Militia. Manuals, aviation, ordnance pamphlets, pensions.
20. Public Domain. Public lands, conservation, naval oil leases.
21. Fishes. Includes oysters, lobsters, and mussels, and hatching experiments.
24. Indians. Publications pertaining to Indian antiquities.
25. Transportation. Railroads, shipping, Postal Service, telegraphs, etc.
28. Finance. Accounting, budget, banking.
31. Education. Includes agricultural and vocational education and libraries.
32. Insular Possessions (Philippines, Porto Rico, Guam, American Samoa, Virgin Islands).
33. Labor. Employers' liability, strikes, wages, insurance (industrial), child-labor.
35. Geography and Explorations. National Parks, explorations, etc.
36. Government Periodicals, for which subscriptions are taken.
37. Tariff. Compilation of acts, decisions, and speeches on tariff, taxation, and income tax, etc.
38. Animal Industry. Domestic animals, poultry and dairy industries.
39. Birds and Wild Animals. North American Fauna, game, fur-bearing animals, etc.
41. Insects. Includes bees, and insects harmful to agriculture and health.

42. Irrigation, Drainage, Water-power. Pumps, well, reclamation.
43. Forestry. Tree planting, management of national forests, lumber industry.
44. Plants. Culture of Fruits, vegetables, cereals, grasses, herbs.
45. Roads. Construction, improvement, and maintenance.
46. Agricultural Chemistry, and Soils and Fertilizers. Food adulteration, preservatives, soil surveys, fertilizers, nitrates, and potash.
48. Weather, astronomy, and Meteorology. Climate, floods, Naval Observatory, and Nautical Almanac Office Publications.
49. Proceedings of Congress. Bound vols. of Congressional Record, Globe, etc.
50. American History and Biography. The Revolution, Civil War, World War.
51. Health. Disease, drugs, sanitation, water pollution, care of infants.
53. Maps. Government maps, and directions for obtaining them.
54. Political Science. Documents and debates relating to initiative, referendum, lynching, Prohibition, District of Columbia, woman suffrage, elections.
55. National Museum. Contributions from National Herbarium, National Academy of Science, and Smithsonian Reports.
58. Mines. Mineral resources, fuel-testing, coal, gas, gasoline, explosives.
59. Interstate Commerce Commission Publications.
60. Alaska. Gold, coal and other mineral resources, railroads, explorations, etc.
62. Commerce and Manufactures. Foreign trade, patents, trusts, and dyestuffs.
63. Navy Marine Corps, Coast Guard, Life-saving Service.
64. Standards of Weights and Measures. Electricity, radiotelegraphy, cement, etc.
65. Foreign Relations. Diplomacy, naval disarmament, treaties, Mexican affairs.
67. Immigration. Aliens, Chinese, Japanese, negroes, citizenship, naturalization.
68. Farm Management. Agricultural statistics, farm accounts, credits, marketing, and conveniences for farm homes.
69. Pacific States: California, Oregon, Washington. All material relating to these states.
70. Census. Statistics, population, manufactures, agriculture, mining, etc.
71. Children's Bureau, and other publications relating to children.
72. Publications of interest to suburbanites and home-builders.
73. Handy Books. Books for ready reference, covering many topics.
74. A bibliography for debaters.
- List of Radio Publications.

#### Wickersham Commission Report on Prosecution

"Today the grand jury is useful only as a general investigating body for inquiring into the conduct of public officers and in case of large conspiracies. It should be retained as an occasional instrument for such purposes, and the requirement of it as a necessary basis of all prosecutions for infamous crimes should be done away with," according to the Report on Prosecution submitted by the National Commission on Law Observance and Enforcement. Appended to the report is "An analysis of the Surveys of the Administration of Criminal Justice Relating to the Subjects of Prosecution and Courts," prepared by Alfred Bettmann, Esq., of Cincinnati, Ohio.

The Commission discusses the subject from the angle of the public prosecutor, the public defender, and the Grand Jury, and in its conclusions recommends:

"(1) Elimination, so far as may be possible in our system of government, of political considerations in the selection and appointment of Federal district attorneys and prosecuting officers and of

appointments based upon political activity or service.

"(2) Better provision for the selection and tenure of prosecutors in the States, and especially for the organization, personnel, tenure, and compensation of the staff of the prosecutor's office.

"(3) Such an organization of the legal profession in each State as shall insure competency, character, and discipline among those who are engaged in the criminal courts.

"(4) A systematized control of prosecutions in each State under a director of public prosecutions or some equivalent official, with secure tenure and concentrated and defined responsibility.

"(5) Provision for legal interrogation of accused persons under suitable safeguards."

According to the report, the prosecuting attorney "has much more power over the administration of criminal justice than the judges." "We have been jealous of the powers of the trial judge, but careless of the continual growth of power in the prosecuting attorney." "The authority to dismiss prosecutions, inherited from the English attorney general, gives the prosecutor enormous power in view of the crowded dockets of today."

"There is a heavy responsibility upon the leaders of the profession and upon bar associations to bring about and maintain adequate standards of admission, of competency, and of conduct," on the part of members of the bar. "Thoroughgoing improvement in the quality and conduct of the habitual practitioners in criminal courts will yield more far-reaching results than any legislative changes in the machinery of prosecutions and the procedure at trials."

#### Corporate Fiduciaries and Legal Ethics

(Continued from Page 446)

tising except professional cards and conventional listings is, we think, a reasonable one."

In recent years, many associations of business men have adopted for their guidance codes or canons of business ethics. Why should not corporate fiduciaries get together and agree to apply those rules of ethics applicable to the establishment and conduct of fiduciary relationships?

These institutions are creatures of the State, created and controlled by the law of New York. It is the plain duty of the legislature to protect the public from exploitation in every field. If those who operate under corporate franchises cannot control, by their own action, unseemly and highly improper activities, legal restraint against such operation will surely come. The continued conduct of some trust companies in violation of the principles I have suggested may well bring about legislative action controlling all corporate fiduciaries in the creation of the trust relationship.

#### Back Numbers Wanted

The AMERICAN BAR ASSOCIATION JOURNAL wishes to obtain copies of the following back numbers: October, 1916; October, 1920; January and September and December, 1921; January and November, 1923; January, 1924; January, 1927. Fifty cents each will be paid for each of the numbers returned.

## AMERICAN BAR ASSOCIATION JOURNAL

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JOSEPH R. TAYLOR,  
MANAGING EDITOR

Journal Office: 1140 N. Dearborn Street  
Chicago, Illinois

### OLD AND NEW MACHINERY

While waiting for the installation of improved machinery of any sort, it is not a bad idea to make the best use possible of the old. And it is astonishing what can be done with the old machinery if there is a genuine disposition to use it most effectively.

Witness what the Illinois State Bar Association has done in regard to the selection of a member of the General Council of the American Bar Association. The members of the Illinois Association, a very large number of whom are also members of the American Bar Association, are of course as interested as anyone in the development of plans for making the national Association more nearly representative of the profession. But instead of waiting for the complete plan of organization embodying this ideal, they decided to see what could be done in the meantime with facilities at hand. The result is that the members of the Association who will nominate the member of the General Council from Illinois at Atlantic City will have an advisory expression from perhaps the largest state group that has ever considered the selection of this representative. Secretary R. Allan Stephens gives the following account of the experiment in a report of the meeting of the Illinois State Bar Association which is printed in this issue:

"In addition to the election of State officers, this year for the first time advantage was taken of the resolution adopted by the Board of Governors of the Illinois State Bar Association providing for an advisory vote for a member of the General Council,

Vice-President and members of the Local Council of the American Bar Association. As a result, five hundred and thirty-nine members of the American Bar Association who are members of the Illinois State Bar Association will recommend to the members who will assemble at Atlantic City, that they nominate Edward W. Everett of Chicago as the Illinois member of the General Council. This is probably the largest number of members of the American Bar Association ever participating in nominating a member of the General Council. The votes were cast by the individual member in his own office and, therefore, reflect the judgment of this large group of Illinois members, instead of the few who may be able to find the place assigned for their meeting at the American Bar Association session."

The local interest in this method of determining the sentiments of the members of the American Bar Association with regard to the nominations for the offices mentioned above is shown by the size of the vote cast. The experiment would certainly seem worth consideration by the members of the Association in the other states. Of course it assumes the hearty cooperation of the officers of the State Bar Association, but we think that this can be safely counted on, in case the members of the American Bar Association in the various states find the method worth while. The device is temporary but it is possible that it may work out into something worth embodying in any final plan that may be adopted for a more broadly representative organization.

The foregoing is a case of using the old machinery while a better sort is being devised and installed. But there may be cases where the old machinery is regarded as really the best and where the failure to supply a new kind is not greatly deplored. Massachusetts seems to furnish an instance of this kind. The Massachusetts House has recently killed a measure relating to the unauthorized practice of law. "What of it?" in substance asks the editor of the Bar Bulletin of the Bar Association of Boston; "we have a better means of dealing with conditions right at hand—by utilizing the power of the courts and the bar." We quote from his editorial on the subject:

"Now whether or not it is desirable to have the legislature define the numerous acts which are to be considered as unlawful practice of the law, the present legislature has refused to do so, and it is highly prob-

able that succeeding legislatures will be equally reluctant. The result is that responsibility for preventing unlawful practice of the law is left to the bar, and to the courts. We venture the opinion that this is as it should be. We doubt the efficacy in practical operation of any blanket act. We do not doubt either the power or the ability of the courts to build stone by stone, according to the good old custom of the common law, a wall which will both protect the bar and the public against the threatened demoralization of ethical standards and at the same time be fair to the layman.

"If the courts cannot control practice of the law by laymen or corporations, then the bar examinations, formal admission to practice, and all the provisions relative thereto in G. L. Chapter 221 are superfluous. The initiative, however, cannot come from the courts. It is no part of their function to start the ball rolling."

And while on the subject of machinery to realize the legitimate aims of the Bar, it may be suggested that conditions may really arise for which there appears to be no adequate machinery available. At least this appears to be the view of the California State Bar, which has recently adopted a plan for a campaign to counteract much public misapprehension as to the function and services of the lawyer. There are to be speakers and the campaign is to be under the direction of a committee of the Board of Governors, cooperating with a wider committee of the Bar. Local judgment as to local conditions must of course rule in deciding on the advisability of such a creation of new machinery. But California's action illustrates the fact that there is plenty of initiative in the Bar when such creation seems good policy.

All discussion of machinery, however, as far as the organization of the Bar and the courts and the general processes of the Administration of Justice are concerned, leads back to the central fact that men, after all, are of cardinal importance. This is why old machinery can be made to work fairly well and why new machinery may not work at all. Chief Justice Hughes put it aptly in his fine tribute to his beloved predecessor: "He realized profoundly that the chief defects in the Administration of Justice lie in men rather than in method. A good judge using the means at the command of an alert and informed mind, will but rarely find that he cannot force his way through to effective

action." In brief, the will has its part in everything that has to do with the machinery of Justice.

#### WRITTEN OPINIONS AND GOVERNOR BRYAN'S VETO

The profession as a whole, we think, will regard with satisfaction Governor Bryan's veto, on constitutional grounds, of the bill passed by the Nebraska Legislature requiring the Supreme Court to hand down written opinions in all decided cases and even on motions. While the Supreme Court has the final word as to the constitutionality of any measure, there is no reason why it should be called on to say it in every instance. This is particularly true where the matter is perfectly plain, as in the case which called for Governor Bryan's veto message. Where the Legislature has attempted an act beyond its power, it is just as much the business of the Executive as of the Supreme Court to say so, when called on to do his part in the process of legislation.

This yearning of legislatures for written opinions is no new thing. It generally springs not so much from a desire to aid in the development of jurisprudence as from the wish of some lawyers to have their arguments given the attention which they think they always deserve; perhaps also from a not unnatural wish to have something to point to in explaining to a defeated client that the court made an egregious error in its opinion. But whatever the motive behind this sort of proposed legislation, it is plainly an attempt at an unwarranted interference with a coördinate branch, which can be safely relied on to decide where a written opinion will be really useful to the Bench and Bar and the science of jurisprudence. It is also an effort to go contrary to the best opinion on the subject, which unquestionably, and for sound reasons, favors a reduction in the number of written opinions. As Presiding Justice Dowling of the New York Appellate Division, First Department, put it in a letter to Justice Hollzer of the California Judicial Council: "I would say that our experience here has led to a gradual decrease yearly in the number of opinions written by the Court. The experience in all departments of the State has been like our own and the number of opinions written has been diminishing every year, apparently to the satisfaction of the Bar and the public alike."

# REVIEW OF RECENT SUPREME COURT DECISIONS

Right of Negro Defendant to Ask Prospective Jurors Whether They Have Race Prejudice Which Would Prevent Giving Him a Fair Trial—Insurer of Increased Value or Anticipated Profits Has No Right of Subrogation Against Wrong-Doer for Loss of Cargo at Sea—Agreements Between Owners of Patents Not Necessarily Violative of Sherman Anti-Trust Law—Copyright Infringement by Radio Transmission—Stipulation in Fire Insurance Policy Against Waiving Provisions or Conditions—Texas Statute as to Suits Against Private Corporations

BY EDGAR BRONSON TOLMAN\*

## Criminal Law—Examination of Jurors—Bias from Race Prejudice

Where a member of the negro race is on trial for murder of a white man the defendant is entitled to inquire of prospective jurors whether they have any racial prejudice, which would prevent their giving a fair and impartial verdict by reason of the defendant's being a negro and the deceased a white man.

*Aldridge v. United States*, Adv. Op. 628; Sup. Ct. Rep., Vol. 51, p. 470.

In this opinion, delivered by the CHIEF JUSTICE, the Court reviewed a decision of the Court of Appeals of the District of Columbia affirming a conviction for murder after a trial in the Supreme Court of the District of Columbia. Review was limited to the ruling of the trial court on the examination on *voir dire* of prospective jurors.

The petitioner, a negro, had been convicted of murdering a white man who was a member of the police force of the District. After certain questions relating to their qualifications had been put to the prospective jurors, the following colloquy took place between the court and counsel for the defendant but out of the hearing of the prospective jurors:

"Mr. Reilly. At the last trial of this case I understand there was one woman on the jury who was a southerner, and who said that the fact that the defendant was a negro and the deceased a white man perhaps somewhat influenced her. I don't like to ask that question in public, but—

"The Court. I don't think that would be a proper question, any more than to ask whether they like an Irishman or a Scotchman.

"Mr. Reilly. But it was brought to our attention so prominently. It is a racial question—

"The Court. It was not this jury.

"Mr. Reilly. No. But it was a racial question, and the question came up—

"The Court. I don't think that is proper.

"Mr. Reilly. Might I, out of an abundance of caution, note an exception.

"The Court. Note an exception.

"Counsel for the defendant requested the court to allow the record to show that the question relative to racial prejudice be propounded to each and every prospective juror, with the exception heretofore noted on behalf of the defendant.

Holding that the ruling of the trial court in this regard was erroneous and that the judgment must be reversed the learned CHIEF JUSTICE said:

In accordance with the existing practice, the questions to the prospective jurors were put by the court, and the

court had a broad discretion as to the questions to be asked. The exercise of this discretion, and the restriction upon inquiries at the request of counsel, were subject to the essential demands of fairness. . . . In asking that the question relative to "racial prejudice" be put to the jurors, it is only reasonable to assume that counsel referred, not to immaterial matters, but to such a prejudice as would disqualify a juror because precluding an impartial verdict. . . . If the court had permitted the question, it doubtless would have been properly qualified. But the court, interrupting counsel, disposed of the inquiry summarily. The court failed to ask any question which could be deemed to cover the subject. If the defendant was entitled to have the jurors asked whether they had any racial prejudice, by reason of the fact that the defendant was a negro and the deceased a white man, which would prevent their giving a fair and impartial verdict, we cannot properly disregard the court's refusal merely because of the form in which the inquiry was presented.

Then followed a review of decisions in the state courts to indicate that the propriety of such an inquiry has been generally recognized.

In conclusion, the Court said:

We do not overlook the reference of the Court of Appeals, in support of the ruling of the trial court, to conditions in the District of Columbia "where the colored race is accorded all the privileges and rights under the law, that are afforded the white race, and especially the right to practice in the courts, serve on the jury, etc." But the question is not as to the civil privileges of the negro, or as to the dominant sentiment of the community and the general absence of any disqualifying prejudice, but as to the bias of the particular jurors who are to try the accused. If in fact, sharing the general sentiment, they were found to be impartial, no harm would be done in permitting the question, but if any one of them was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit. Despite the privileges accorded to the negro, we do not think that it can be said that the possibility of such prejudice is so remote as to justify the risk in forbidding the inquiry. And the risk becomes most grave when the issue is of life or death.

The argument is advanced on behalf of the Government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.

MR. JUSTICE McREYNOLDS delivered a separate opinion in which he expressed the view that the judgment under review should have been affirmed. In this opinion the limitation placed by Congress on appellate

\*Assisted by JAMES L. HOMIRE

courts by Section 391, Title 28, U. S. Code was pointed out. That section provides that

"All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

A discussion of the record appears in this opinion in which it was emphasized that it is not disclosed what the precise nature of the question was which the defendant's counsel desired to be put to the jury, and nothing to show that any juror entertained prejudice which might have impaired his ability fairly to pass upon the issues.

This opinion was concluded as follows:

Section 391 of the U. S. Code, I think, was intended to prevent escape of culprits from prompt, deserved punishment in cases like this. Congress had clear right to put the limitation on courts of review and the enactment should be given effect according to its purpose.

Unhappily, the enforcement of our criminal laws is scandalously ineffective. Crimes of violence multiply; punishment walks lamely. Courts ought not to increase the difficulties by magnifying theoretical possibilities. It is their province to deal with matters actual and material; to promote order, and not to hinder it by excessive theorizing of or by magnifying what in practice is not really important.

The case was argued by Mr. James Francis Reilly for the petitioner and by Mr. Leo A. Rover for the respondent.

#### Maritime Insurance—Increased Value—Subrogation

The measure of damages recoverable against a wrongdoer for loss of a cargo at sea, as the result of a maritime tort, is the value of the cargo at the time and place of shipment, without allowance for increase of value or anticipated profits. Consequently, an insurer of increased value or anticipated profits has no right of subrogation in respect of those items, in case of loss of the insured cargo, for the reason that the insured has no right of action to which the insurer can be subrogated in respect of such items.

*Standard Marine Insurance Co., Ltd., v. Scottish Metropolitan Assurance Co., Ltd.*, Adv. Op. 509; Sup. Ct. Rep., Vol. 51, p. 371.

This opinion dealt with the rights which maritime insurance companies have by way of subrogation. The respondent company had insured a cargo of wheat, for the buyer's account, to be shipped from Port Arthur to Montreal at a valuation of \$1.42 per bushel, the risk to begin immediately after loading. The purchaser also had taken out insurance covering "increased value" of the grain above its costs, C. I. F. Montreal. That value was stipulated as the difference between C. I. F. cost and the high value per bushel between the day of sailing and the day on which the cargo would have arrived at destination, plus 5c.

A collision occurred in which the whole cargo was lost. In a proceeding for limitation of liability both vessels in the collision were held at fault, and the cargo owner recovered \$309,500 for the wheat, with interest. This figure represented its value at the time and place of shipment.

The respondent paid the purchaser \$284,000, the full amount of its policy. The petitioner paid \$62,500,

which was at the rate of 31¼c per bushel, and was the difference between the C. I. F. price and the highest market price within the agreed ten days, plus 5c. Both insurers intervened in the limitation proceeding and asserted a right to be subrogated to the cargo owner's right to recovery.

The district court decreed payment to the respondent of \$284,000, the full amount of its insurance liability, with interest, and decreed payment of the balance to the petitioner. This was affirmed by the Circuit Court of Appeals.

Both courts thought that as the insurer, on payment of the loss, is subrogated only to such right of recovery as the insured had, *Phoenix Ins. Co. v. Erie & W. Trans. Co.*, 117 U. S. 312, and as the latter had no right to recover for any increase in value beyond that at the time and place of shipment, petitioner, so far as it had insured such an increase in value, was not entitled to participate in the recovery, since participation would amount to the assertion of a right of recovery which the insured did not possess.

On certiorari the decree was affirmed by the Supreme Court, in an opinion by MR. JUSTICE STONE. In disposing of the case he pointed out that, to the extent that it had insured the cargo for more than its value at the time and place of shipment, the petitioner had insured against a risk for which the owner of the cargo could not recover against the wrongdoers, and to that extent the owner had no right to which the petitioner could be subrogated.

We think it clear, and it seems to be conceded, that since respondent is an insurer against loss of cargo, petitioner, if its policy be regarded as insuring against loss of profits of the venture, is not a co-insurer with respondent, even though the liability of both accrued by reason of the destruction of the cargo by the same peril. The very purpose of insurance of profits is to protect the insured against risk of loss which is not covered by insurance upon the cargo itself.

When the insured thus separates and separately insures two distinct elements of risk—value of cargo and profits which may be earned on it—both insurers cannot share by subrogation in his right to recover against wrongdoers for cargo damage alone. For, while destruction of the cargo has in a sense occasioned both losses, the wrongdoer is liable for one and not the other; and hence there is no right of recovery by the insured for loss of profits to which the insurer against that loss may be subrogated. The object of subrogation is to make indemnity to the insured, up to the amount of the policy, the measure of the liability of the insurer, and that is its justification. But the liability would be less than such indemnity if the insurer could be subrogated to a right of recovery by the insured for a loss other than that insured against.

Petitioner insists that its insurance was not of anticipated profits, but of increased value of the property, not differing from any other insurance on property, with respect to which the insurer when called upon to contribute to loss of its value becomes entitled to share pro rata with other insurers of the property in any recovery by the insured against third persons causing the loss. . . . But this argument leaves out of account the peculiar nature of insurance on increased value of cargo over its value at the port of departure which, for present purposes, is to be distinguished from insurance on hull or any other property, increase in value of which may be embraced in, and recovered under policies insuring against a loss of the property.

It has long been the accepted rule, in the law of maritime torts and of maritime insurance, that the recoverable value of cargo lost or damaged at sea is that at time and place of shipment, without allowance for increase of value or anticipated profits. . . . The cargo is placed at risk when the voyage begins. Its value then is the measure of the risk and of the loss suffered if the cargo is lost or damaged on the voyage. Market value at destination on the date of the loss is not the measure, for that was not its value at the place of loss. To attribute to the cargo the market value at destination is to measure, not the loss, but the profits which would have accrued if the voyage had been completed, and if the market price at the time of

loss had continued to be the market price at the time of arrival.

Petitioner's policy describes the insurance as upon "increased value on grain." But so far as it covered the increase in value over that at the port of departure, it insured against a loss not covered by the insurance on cargo or recoverable against tort-feasors causing cargo loss. . . . The liability on the policy above the value of cargo at Port Arthur represents profits, as valued, which it might reasonably be assumed would have accrued to insured if the cargo had reached Montreal. But whether that coverage may for all purposes be correctly described as insurance of profits or not, it can stand on no different footing in the present case, for, like insurance of profits, it covers risk of loss not covered by the cargo policy; and the reasons which preclude the insurer of profits from participating, by way of subrogation, in the recovery of the insured for maritime torts causing loss of the cargo should exclude petitioner from participation here.

The case was argued by Mr. Russell T. Mount for the petitioner and by Mr. T. Catesby Jones for the respondent.

#### Statutes—Sherman Anti Trust Act—Pooling Patents

Cross-licensing agreements between the owners of patents covering the process of manufacturing gasoline by cracking, whereby each patent owner, in settlement of disputes with the others as to infringements of each other's patents, obtains the use of the others' patents in its own process, and the right to license other refiners under its own patents with immunity from future claims of infringement of patents controlled by the other patent owners, and whereby each owner receives a share, in some fixed proportion, of the royalties to be paid for licenses granted under the others' patents, are not necessarily violative of the Sherman Anti Trust Act.

Where there is no adequate proof that such agreements in fact result in a monopoly or restriction of competition in the sale of gasoline in interstate commerce, the agreements are a lawful exercise of the monopolies conferred by virtue of the patents granted, and an injunction will not lie to prevent the continued performance of such agreements.

*Standard Oil Company (Indiana) v. United States*, Adv. Op. 490; Sup. Ct. Rep., Vol. 51, p. 421.

This opinion, delivered by MR. JUSTICE BRANDEIS, disposed of an appeal from a decree of the District Court for the Northern District of Illinois enjoining the appellants from alleged violation of the Sherman Act. That Court had granted some of the relief sought by the government, but on appeal the decree was reversed by the Supreme Court.

The violation charged was a combination to create a monopoly and to restrain interstate commerce by controlling gasoline produced by "cracking." Control was alleged through 79 contracts concerning "cracking" patents, and the parties to the contracts were made defendants. Four defendants own patents covering the cracking process, and are called primary defendants. They are the Standard Oil Company of Indiana, the Texas Company, the Standard Oil Company of New Jersey, and Gasoline Products Company. The latter is merely a licensing concern, but the others are large producers of cracked gasoline. The other defendants, referred to as secondary defendants, manufacture cracked gasoline under licenses from the primary defendants.

After protracted hearings before a master, at which a large mass of evidence was presented, the master found that the primary defendants had not pooled

their patents; had not monopolized or attempted to monopolize the commerce; that none of the defendants had entered a combination in restraint of trade; and recommended that the bill be dismissed for want of equity.

Before advertent to the contentions raised by the parties, MR. JUSTICE BRANDEIS first summarized the facts out of which the alleged combination had developed, saying,

The issues to which most of the evidence was addressed have been eliminated. The violation of the Sherman Act now complained of rests substantially on the making and effect of three contracts entered into by the primary defendants. The history of these agreements may be briefly stated. For about half a century before 1910, gasoline had been manufactured from crude oil exclusively by distillation and condensation at atmospheric pressure. When the demand for gasoline grew rapidly with the widespread use of the automobile, methods for increasing the yield of gasoline from the available crude oil were sought. It had long been known that from a given quantity of crude, additional oils of high volatility could be produced by "cracking;" that is, by applying heat and pressure to the residuum after ordinary distillation. But a commercially profitable cracking method and apparatus for manufacturing additional gasoline had not yet been developed. The first such process was perfected by the Indiana Company in 1913; and for more than seven years this was the only one practiced in America. During that period the Indiana Company not only manufactured cracked gasoline on a large scale, but also had licensed fifteen independent concerns to use its process and had collected, prior to January 1, 1921, royalties aggregating \$15,057,432.46.

Meanwhile, since the phenomenon of cracking was not controlled by any fundamental patent, other concerns had been working independently to develop commercial processes of their own. Most prominent among these were the three other primary defendants, the Texas Company, the New Jersey Company, and the Gasoline Products Company. Each of these secured numerous patents covering its particular cracking process. Beginning in 1920, conflict developed among the four companies concerning the validity, scope, and ownership of issued patents. One infringement suit was begun; cross-notice of infringement, antecedent to other suits, were given; and interferences were declared on pending applications in the Patent Office. The primary defendants assert that it was these difficulties which led to their executing the three principal agreements which the United States attacks; and that their sole object was to avoid litigation and losses incident to conflicting patents.

By these contracts, which differed but slightly from each other in scope and terms, each primary defendant was released from liability for past infringements of patents of the others, and acquired the right to use these patents thereafter in its own process. Each was empowered to extend releases to other concerns for past and future infringements of patents held by the other primary defendants, licensed under its process, and each was to share in some fixed proportion the fees received under these multiple licenses. The royalties to be charged were fixed in the first contract, and minimum sums per barrel, to be divided between the Texas and Indiana companies, were specified in the other two.

Among the contentions of the parties the first to be considered was that of the defendants that the agreements relate solely to the issuance of licenses under their patents, which does not constitute interstate commerce, so that the Sherman Act is not applicable. This was rejected as unsound.

Any agreement between competitors may be illegal if part of a larger plan to control interstate markets. . . . Such contracts must be scrutinized to ascertain whether the restraints imposed are regulations reasonable under the circumstances, or whether their effect is to suppress or unduly restrict competition. . . . Moreover, while manufacture is not interstate commerce, agreements concerning it which tend to limit the supply or to fix the price of

goods entering into interstate commerce, or which have been executed for that purpose, are within the prohibitions of the Act. . . And pooling arrangements may obviously result in restricting competition. . . The limited monopolies granted to patent owners do not exempt them from the prohibitions of the Sherman Act and supplementary legislation. . . Hence the necessary effect of patent interchange agreements, and the operations under them, must be carefully examined in order to determine whether violations of the Act result.

The remaining portions of the opinion were devoted to points urged by the government. The first of these was that the three agreements constitute a pooling of royalties derived by the primary defendants from their patents; that this eliminates competition between them in the exercise of their respective rights to issue licenses; that this tends to maintain or increase royalties and hence to increase the manufacturing cost of cracked gasoline; that that the primary defendants exclude from commerce gasoline which, under lower competitive royalty rates, would be produced, thereby unlawfully restraining interstate commerce. In this connection the Court pointed out that the agreements contain no provision restricting the issuance of licenses under the patents, that no agreement limits the quantity of gasoline to be produced, or the price, terms, or conditions of sale, or the territory in which sales may be made. The only restraint charged is that necessarily arising out of the making and effect of the provisions for cross-licensing and for divisions of royalties.

The Government concedes that it is not illegal for the primary defendants to cross-license each other and the respective licensees; and that adequate consideration can legally be demanded for such grants. But it contends that the insertion of certain additional provisions in these agreements renders them illegal. It urges, first, that the mere inclusion of the provisions for the division of royalties, constitutes an unlawful combination under the Sherman Act because it evidences an intent to obtain a monopoly. This contention is unsound. Such provisions for the division of royalties are not in themselves conclusive evidence of illegality. Where there are legitimately conflicting claims or threatened interferences, a settlement by agreement, rather than litigation, is not precluded by the Act. . . An interchange of patent rights and a division of royalties according to the value attributed by the parties to their respective patent claims is frequently necessary if technical advancement is not to be blocked by threatened litigation. If the available advantages are open on reasonable terms to all manufacturers desiring to participate, such interchange may promote rather than restrain competition.

The next contention considered was that the agreements to maintain royalties violate the Act because the fees are onerous, since the primary defendants enjoy the advantage of manufacturing free of royalty, while licensees must pay heavy tribute in fees, so that the primary defendants may exclude from commerce gasoline which would, under lower competitive rates, be produced by possible rivals.

This argument ignores the privileges incident to ownership of patents. Unless the industry is dominated, or interstate commerce directly restrained, the Sherman Act does not require cross-licensing patentees to license at reasonable rates others engaged in interstate commerce.

Next in order was considered the government's main contention that the three agreements are illegal, because they enable the primary defendants to maintain existing royalties, and thereby to restrain interstate commerce; and that they are illegal even though the exchange of patent rights and division of royalties are not necessarily improper and the royalties not oppressive.

The provisions which constitute the basis for this charge are these. The first contract specifies that the Texas

Company shall get from the Indiana Company one-fourth of all royalties thereafter collected under the latter's existing license agreements; and that all royalties received under licenses thereafter issued by either company shall be equally divided. Licenses granting rights under the patents of both are to be issued at a fixed royalty—approximately that charged by the Indiana Company when its process was alone in the field. By the second contract, the Texas Company is entitled to receive one-half of the royalties thereafter collected by the Gasoline Products Company from its existing licensees, and a minimum sum per barrel for all oil cracked by its future licensees. The third contract gives to the Indiana Company one-half of all royalties thereafter paid by existing licensees of the New Jersey Company, and a similar minimum sum for each barrel treated by its future licensees,—subject in the latter case to reduction if the royalties charged by the Indiana and Texas companies for their processes should be reduced. The alleged effect of these provisions is to enable the primary defendants, because of their monopoly of patented cracking processes, to maintain royalty rates at the level established originally for the Indiana process.

The rate of royalties may, of course, be a decisive factor in the cost of production. If combining patent owners effectively dominate an industry, the power to fix and maintain royalties is tantamount to the power to fix prices. . . Where domination exists, a pooling of competing process patents, or an exchange of licenses for the purpose of curtailing the manufacture and supply of an unpatented product, is beyond the privileges conferred by the patents and constitutes a violation of the Sherman Act. The lawful individual monopolies granted by the patent statutes cannot be unitedly exercised to restrain competition. . . But an agreement for cross-licensing and division of royalties violates the Act only when used to effect a monopoly, or to fix prices, or to impose otherwise an unreasonable restraint upon interstate commerce. . . In the case at bar, the primary defendants own competing patented processes for manufacturing an unpatented product which is sold in interstate commerce; and agreements concerning such processes are likely to engender the evils to which the Sherman Act was directed. . . We must, therefore, examine the evidence to ascertain the operation and effect of the challenged contracts.

An examination of the evidence adduced in proof of the charge of monopoly or restriction of competition indicated that there was inadequate support for it. It appeared that in 1924 and 1925, after the cross-licensing arrangements were in effect, the four primary defendants owned or licensed only 55% of the total cracking capacity, and the record disclosed no decrease in competition among the four in licensing other refiners, after the contracts went into effect. Moreover, for the years mentioned, cracked gasoline was about 26% of the total gasoline produced, so that it was not proved that there was a monopoly or restriction of competition in the production of either cracked or ordinary gasoline.

Summarizing this aspect of the case, MR. JUSTICE BRANDEIS said:

Thus it appears that no monopoly of any kind, or restraint of interstate commerce, has been effected either by means of the contracts or in some other way. In the absence of proof that the primary defendants had such control of the entire industry as would make effective the alleged domination of a part, it is difficult to see how they could by agreeing upon royalty rates control either the price or the supply of gasoline, or otherwise restrain competition. By virtue of their patents they had individually the right to determine who should use their respective processes or inventions and what the royalties for such use should be. To warrant an injunction which would invalidate the contracts here in question, and require either new arrangements or settlement of the conflicting claims by litigation, there must be a definite factual showing of illegality.

The government contended also that the agreements between the primary defendants were made in bad faith, that there was no substantial foundation for the alleged conflicts and threatened infringement suits;

that they were but a pretext; and that the patents were obtained and the infringements asserted merely to lend color of legality to the agreements. The master found, however, that the presumption of validity of the patents had not been negated, that they had been acquired in good faith, and that they overlapped enough to justify threats and fears of litigation. The district court confirmed the findings of presumptive validity and did not question the finding of good faith.

It held that the patents were adequate consideration for the cross-licensing agreements and that the violation charged could not be predicated on patent invalidity. Inasmuch as the Government did not appeal from these findings, we need not consider any of the issues concerning the validity or scope of the cracking patents; and we accept the finding that they were acquired in good faith. Neither the findings nor the evidence on this issue supply any ground for invalidating the contracts.

In conclusion, the Court said:

The District Court accepted the Government's estimates of cracked gasoline production; found that the primary defendants were able to control both supply and price by virtue of their control of the cracking patents; held that although these patents were valid consideration for the cross-licenses, the agreement to maintain royalties was in effect a method for fixing the price of cracked gasoline; and concluded that a monopoly existed as a result of such agreements. This appears to be the only basis for the relief granted. But the widely varying estimates, relied upon to establish dominant control of the production of cracked gasoline were insufficient for that purpose. And the court entirely disregarded not only the fact that the manufacture of the cracked is only a part of the total gasoline production, but also the evidence showing active competition among the defendants themselves and with others. Its findings are without adequate support in the evidence. The bill should have been dismissed.

The Government now seeks no relief against the secondary defendants. It concedes that fifty-three of the seventy-nine contracts, originally set out in the petition, are wholly beyond attack, because they are licenses issued to secondary defendants prior to the execution by their licensors of the three main agreements challenged. As to the remaining contracts between primary and secondary defendants, the Government on this appeal agreed that the decree should be modified to declare such contracts voidable at the option of the licensees. This modification was assented to at the bar by counsel for the primary defendants. But as we are of the opinion that the decree should be reversed and the bill dismissed, we see no occasion for interfering with the present license arrangements.

MR. JUSTICE STONE took no part in the case.

The case was argued by Messrs. C. B. Ames and Charles Neave for the primary appellants, by Mr. G. H. Dorr for the secondary appellants, and by Solicitor General Thacher for appellee.

#### Radio Law—Copyright Infringement by Radio Transmission—Measure of Damages for Infringements

The acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loud speakers installed in his hotel and under his control and for the entertainment of his guests, the hearing of a copyrighted musical composition which has been broadcast from a broadcasting station, constitute a performance of such composition within the meaning of Section 1(e) the Copyright Act of 1909.

In case of infringement of a copyright on a musical composition, there being no proof of actual damages, the court is bound by the minimum amount of \$250 set out in

the so-called "no other case" clause of Section 25(b) of the Copyright Act.

*Jewell-LaSalle Realty Co. v. Buck*, Adv. Op. 506; Sup. Ct. Rep., Vol. 51, p. 407.

The suits considered in this opinion were brought by the American Society of Composers, Authors and Publishers against a company which operates a hotel in Kansas City. The plaintiffs sought an injunction and damages for alleged infringements of a copyright on a popular song. The hotel company has a master radio receiving set which is connected with loud speakers or head-phones in public and private rooms of the hotel, and, as part of the service offered guests, programs received over the master set can be heard throughout the hotel. The issue involved here grew out of the hotel's making available to its guests the broadcasting of a copyrighted song which the hotel had received on its master set from a duly licensed commercial broadcasting station. It had no arrangement with the broadcasting station, but it had been notified of the existence of the copyright and advised that performance of the musical composition without a license was forbidden.

The district court denied relief on the ground that the acts of the hotel did not constitute a "performance" under the Copyright Act. On appeal the Circuit Court of Appeals certified to the Supreme Court the following question:

"Do the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loud speakers installed in his hotel and under his control and for the entertainment of his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting station, constitute a performance of such composition within the meaning of 17 USC Sec. 1(e)?"

This question the Supreme Court answered in the affirmative in an opinion by MR. JUSTICE BRANDEIS, after a discussion of the contentions made by the defendants as a defense to the action.

The provision of the Copyright Act to which the question related provides that:

"Any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right: . . . (e) To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit."

The Court's discussion of the defendants' contentions follows:

First. The defendant contends that the Copyright Act may not reasonably be construed as applicable to one who merely receives a composition which is being broadcast. Although the art of radio broadcasting was unknown at the time the Copyright Act of 1909 was passed, and the means of transmission and reception now employed is wholly unlike any then in use, it is not denied that such broadcasting may be within the scope of the Act. . . . The argument here urged, however, is that since the transmitting of a musical composition by a commercial broadcasting station is a public performance for profit, control of the initial radio rendition exhausts the monopolies conferred—both that of making copies (including records) and that of giving public performances for profit (including mechanical performances from a record); and that a monopoly of the reception, for commercial purposes, of this same rendition is not warranted by the Act. The analogy is invoked of the rule under which an author who permits copies of his writings to be made cannot, by virtue of his copyright, prevent or restrict the transfer of such copies. . . . This analogy is inapplicable. It is true that control of the sale of copies is not permitted by the Act, but a monopoly is expressly granted of all public performances for profit.

The defendant next urges that it did not perform because there can be but one actual performance each time

a copyrighted selection is rendered; and that if the broadcaster is held to be a performer, one who, without connivance, receives and distributes the transmitted selection cannot also be held to have performed it. But nothing in the Act circumscribes the meaning to be attributed to the term "performance," or prevents a single rendition of a copyrighted selection from resulting in more than one public performance for profit. While this may not have been possible before the development of radio broadcasting, the novelty of the means used does not lessen the duty of the courts to give full protection to the monopoly of public performance for profit which Congress has secured to the composer. . . . No reason is suggested why there may not be more than one liability. And since the public reception for profit in itself constitutes an infringement, we have no occasion to determine under what circumstances a broadcaster will be held to be a performer, or the effect upon others of his paying a license fee.

The defendant contends further that the acts of the hotel company were not a performance because no detailed choice of selections was given to it. In support of this contention it is pointed out that the operator of a radio receiving set cannot render at will a performance of any composition but must accept whatever program is transmitted during the broadcasting period. Intention to infringe is not essential under the Act. . . . And knowledge of the particular selection to be played or received is immaterial. One who hires an orchestra for a public performance for profit is not relieved from a charge of infringement merely because he does not select the particular program to be played. Similarly, when he tunes in on a broadcasting station, for his own commercial purposes, he necessarily assumes the risk that in so doing he may infringe the performing rights of another. . . . It may be that proper control over broadcasting programs would automatically secure to the copyright owner sufficient protection from unauthorized public performances by use of a radio receiving set, and that this might justify legislation denying relief against those who in using the receiving set innocently invade the copyright, but the existing statute makes no such exception.

Second. The defendant contends that there was no performance because the reception of a radio broadcast is no different from listening to a distant rendition of the same program. We are satisfied that the reception of a radio broadcast and its translation into audible sound is not a mere audition of the original program. It is essentially a reproduction. As to the general theory of radio transmission there is no disagreement. All sounds consist of waves of relatively low frequencies which ordinarily pass through the air and are locally audible. Thus music played at a distant broadcasting studio is not directly heard at the receiving set. In the microphone of the radio transmitter the sound waves are used to modulate electrical currents of relatively high frequencies which are broadcast through an entirely different medium, conventionally known as the "ether." These radio waves are not audible. In the receiving set they are rectified; that is, converted into direct currents which actuate the loud-speaker to produce again in the air sound waves of audible frequencies. The modulation of the radio waves in the transmitting apparatus, by the audible sound waves is comparable to the manner in which the wax phonograph record is impressed by these same waves through the medium of a recording stylus. The transmitted radio waves require a receiving set for their detection and translation into audible sound waves, just as the record requires another mechanism for the reproduction of the recorded composition. In neither case is the original program heard; and, in the former, complicated electrical instrumentalities are necessary for its adequate reception and distribution. Reproduction in both cases amounts to a performance. . . . In addition, the ordinary receiving set, and the distributing apparatus here employed by the hotel company are equipped to amplify the broadcast program after it has been received. Such acts clearly are more than the use of mere mechanical acoustic devices for the better hearing of the original program. The guests of the hotel hear a reproduction brought about by the acts of the hotel in (1) installing, (2) supplying electric current to, and (3) operating the radio receiving set and loud-speakers. There is no difference in substance between the case where a hotel engages an orchestra to furnish the music and that where, by means of the radio set and loud-speakers here employed, it furnishes the same music for the same purpose. In each the music is produced by instrumentalities under its control.

Third. The defendant contends that there was no performance within the meaning of the Act because it is not

shown that the hotel operated the receiving set and loud-speakers for profit. Unless such acts were carried on for profit, there can, of course, be no liability. But whether there was a performance does not depend upon the existence of the profit motive. The question submitted does not call for a determination whether the acts of the hotel company recited in the certificate constitute operation for profit.

On a cross-appeal there was raised a question as to the damages to be allowed for an unauthorized orchestral performance of a musical composition for which the plaintiffs held exclusive non-dramatic performing rights. The infringement was proved, but there was no showing of actual damages. The defendant contended that only \$10 was recoverable, but the court allowed \$250 as the minimum allowable under the Copyright Act of 1909. Questions relating to damages were also certified, and were considered in a separate opinion by MR. JUSTICE BRANDEIS.

The first of these questions was stated as follows:

Question II. "In a case disclosing infringement of a copyright covering a musical composition, there being no proof of actual damages, is the court bound by the minimum amount of \$250 set out in the so-called 'no other case' clause of Section 25(b) of the Copyright Act (17 U. S. C. Sec. 25), reading, 'and such damages shall in no other case exceed the sum of \$5,000 nor be less than the sum of \$250, and shall not be regarded as a penalty?'"

The statute referred to provides that any person who shall infringe the copyright in any work protected by copyright shall be liable to pay such damages as the copyright proprietor shall suffer, due to the infringement. . . . "or in lieu of actual damages and profits such damages as to the court shall appear just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated," but (then follow certain limitations not applicable here), "and such damages shall in no other case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars and shall not be regarded as a penalty."

The "Fourth" item of the so-called schedule which later follows provides that, "In the case of dramatic or dramatic-musical or a choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing performance; in the case of other musical compositions, ten dollars for every infringing performance."

In answering affirmatively the question certified, MR. JUSTICE BRANDEIS pointed out that there is nothing to show an intention to exclude any infringements from the maximum and minimum clauses except those for which other provision is specifically made.

The Copyright Act confers two monopolies—that of making copies and that of giving public performances for profit. It was settled in *Westermann Co. v. Dispatch Printing Co.*, 249 U. S. 100, which dealt with the infringement by a newspaper of the monopoly of copying, that for each publication \$250 is the minimum damages. An unbroken line of decisions in the lower courts has since held that the rule declared in the *Westermann* case is applicable also to infringement of the monopoly of giving public performances. It is now contended that, as applied to performances, the rule is burdensome and unreasonable; that it was followed unwillingly by the lower courts in the mistaken belief that the *Westermann* case required them to do so; that the legislative history of Section 25, when considered in the light of earlier copyright acts, indicates that the fourth subdivision, relating to musical compositions, was not intended to be controlled by the maximum and minimum provisions of the so-called "no other case" clause; and that the decision in the *Westermann* case is not decisive of the question certified.

The argument is that Section 25 was a codification of Section 4965 and Section 4966 of the Revised Statutes which embodied a distinction recognized in earlier Acts

between the imposition of penalties for copying, and the awarding of damages for performing; that there is no language in Section 25 indicating an intention to apply the maximum and minimum provisions, theretofore contained in the penal Section 4965 which dealt with unauthorized copying, to cases falling within the former remedial Section 4966 which gave damages for unauthorized performing; and that a contrary intention appears from the House Report of the 1909 Act. This argument overlooks the fact that the primary purpose of Section 25 was to incorporate in one section all of the civil remedies theretofore given, including statutory damages where actual proof was lacking. It is true that the second subdivision, involved in the *Westerman* case, had been part of the old penal Section 4965 of the Revised Statutes. But there is nothing to show an intention to exclude the infringements mentioned in the other subdivisions from the operation of the maximum and minimum clause. The history of the section, as revealed in the extended hearings which preceded the Act of 1909, makes the contrary clear. We are of opinion that the maximum and minimum provisions were intended to be applicable alike to all types of infringement except those for which the section makes other specific provision.

It is urged, however, that under such interpretation the suggested measure of ten dollars a performance, scheduled in the fourth subdivision of Section 25, would not be applicable unless more than twenty-five infringing performances were proved. This appears to be the meaning of the section, read as a whole, particularly since the amounts in the scheduled subdivisions appear to have been inserted merely as an aid to the court in awarding such damages as "shall appear to be just." The definite specification of a maximum and minimum in every case, is not contradicted in any way by these legislative suggestions as to what may be deemed reasonable allowances in cases falling within the prescribed limitations. . . . If, as applied to musical compositions, the provisions of the entire section have proved unreasonable, the remedy lies with Congress.

A further question and the discussion disposing of it follow:

Question III. "Is Section 25(b) Fourth of the Copyright Act (17 U. S. C. sec. 25), applicable in the discretion of the Court, to a case disclosing infringement of copyright covering a musical composition, there being no proof of actual damage?"

This question has in part been necessarily answered by our discussion of Question II, for unless the number of infringing performances of a copyrighted musical composition exceeds twenty-five, the minimum allowance of \$250 must be made. Where more than twenty-five infringing performances are proved, and there is no showing as to actual loss, the court must allow the statutory minimum, and may, in its sound discretion, employ the scheduled ten dollars a performance as a basis for assessing additional damages. Subject to this limitation, Question III is answered in the affirmative.

These cases were argued by Mr. Charles M. Blackmar for the appellants.

#### Insurance—Waiver of Written Proof of Loss— State Statutes—Allowance of Interest

A stipulation in a fire insurance policy that no officer or agent of the insurance company shall have power to waive any provision or condition of the policy, except in writing endorsed thereon, has reference to provisions and conditions which constitute part of the contract of insurance and does not apply to a waiver, after loss has occurred, of stipulations in respect of things to be done subsequent to the loss as prerequisites to adjustment and payment.

Where the meaning of a state statute regarding interest cannot be definitely ascertained from the decisions of the court of last resort of the state, the federal courts sitting in the state will follow the rule recognized in the federal courts that, even in the case of unliquidated damages, interest or its equivalent may be included as an element of

damages in the sound discretion of the court, when necessary in order to arrive at fair compensation.

*Concordia Insurance Co. of Milwaukee v. School District No. 98*, Adv. Op. 387; Sup. Ct. Rep., Vol. 51, p. 275.

The four cases disposed of in this opinion were brought in a state court of Oklahoma to recover damages on fire insurance policies. They were removed to the federal court, where they were consolidated and tried. After trial by a jury a verdict was found for the plaintiff on which a judgment was entered, with a further sum for interest from the date on which liability accrued. On appeal the circuit court of appeals struck the bill of exceptions from the transcript and disposed of the cases as upon demurrers to amended complaints.

Certiorari was asked upon the ground, (1) that the court had construed a state statute, relating to allowance of interest, contrary to the construction put on it by the state supreme court; and (2) that there was a conflict between the decision rendered and one rendered in the Eighth Circuit in respect to the contention that the requirement in the policies that proofs of loss must be furnished within 60 days could not be waived except in writing.

The judgment under review was affirmed by the Supreme Court in an opinion by MR. JUSTICE SUTHERLAND. Consideration was first given to the latter of the grounds above stated, and the provisions of the policies were thus summarized:

Each of the policies provided that in case of fire immediate notice in writing of any loss should be given to the company, and within sixty days a statement should be rendered, signed and sworn to by the insured, setting forth the time and origin of the fire, the interest of insured and others in the property, the cash value of the items and amount of loss upon each, and other particulars; that the company should not be held to have waived any provision or condition of the policy by any requirement, act or proceeding on its part relating to the appraisal, or any examination provided for; that the loss should not become payable until sixty days after the notice, ascertainment, estimate, and proof of loss had been received by the company, including an award by an appraiser when appraisal had been required; that no person, unless duly authorized in writing, should be deemed an agent of the insurer in any matter relating to insurance; that no officer, agent, or other representative should have power to waive any provision or condition of the policy except such as by the terms of the policy might be the subject of agreement endorsed thereon or added thereto; and that no waiver should be effective unless written upon or attached to the policy.

The facts alleged by the respondent as constituting waiver and estoppel were in substance as follows: that within two or three hours after the fire the respondent notified agents of the petitioners of the fire and the extent of the damage, with the request that they notify their companies. Within two or three days after that the companies named adjusters to investigate the fire and make estimates as to the value of the property destroyed, and settle for the loss. These adjusters visited the scene and made an investigation. They selected a building contractor to make estimates as to the value of the property. On the 56th day after the fire a meeting was held at which the trustees of the school, the adjuster and the building contractor were present. The upshot of this was that the adjusters offered to pay \$3,400.00 for the loss of furniture and fixtures and stated that the building could be replaced for \$53,000, and consequently they offered \$56,000 for the entire loss. The trustees contended that the building's value was \$75,000, and requested the insurers to replace the building, but the latter refused to do this. No objec-

tion was made as to the failure to furnish proof of loss, and the respondent contended that the insurers, by their conduct in the premises, had led them to believe that the only matter in dispute was the value of the building, and that the insurers had waived the furnishing of proof of loss in strict accordance with the policies; and that, through their adjusters, the insurers had obtained all the information that could have been obtained by proof of loss in accordance with the policies.

On these facts, the Supreme Court expressed the opinion that the respondent's position as to waiver or estoppel was sustained.

Upon demurrer these allegations must be taken as true. And, unless the stipulation contained in the policy that any waiver to be effective must be written upon or attached to the policy stands in the way, it is clear that the facts alleged are sufficient to constitute a waiver of, or, what amounts to the same thing, an estoppel against setting up, the condition requiring verified proofs of loss to be furnished within sixty days. . . . That the stipulation does not stand in the way is settled by the great preponderance of federal and state decisions. The rule deducible from these authorities is that such a stipulation has reference to those provisions and conditions which constitute part of the contract of insurance, and does not apply to a waiver, after the loss occurs, of stipulations in respect of things to be done subsequent to the loss as prerequisites to adjustment and payment.

As to *Scottish Union & Nat. Ins. Co. v. Encampment Smelting Co.*, 166 Fed. 231, which the insurers relied on, the Court expressed disapproval.

We cannot accept the theory of that case. It is out of harmony with the general current of authority, and with the views we have expressed. A late decision of the Circuit Court of Appeals for the Eighth Circuit clearly indicates that if the same question were again before that court the *Scottish Union* case would not be followed. *Hartford Fire Ins. Co. v. Empire Coal Min. Co.*, 30 F. (2d) 794, 802.

The question raised as to the effect of the state statute regarding interest was then discussed. The rule that the federal courts will accept the construction placed upon the state statutes by the highest court of the state was recalled.

The general rule that a federal court will follow the decisions of the highest court of a state construing a state statute is, of course, well established. The difficulty here is that, prior to the judgment of the federal district court in this case allowing interest, the decisions of the Supreme Court of Oklahoma were in such confusion that the view of that court in respect of the meaning of the statute, as applied to the present case, could not definitely be determined.

It was then pointed out that, since it was impossible to determine the construction which the state court had placed upon the statute at the time the decision of the district court was rendered, the latter was free to follow the rule laid down generally for the federal courts. Under that rule interest may be allowed in the sound discretion of the court, when necessary to arrive at fair compensation.

Here the insurance companies had admitted their liability in the sum of \$3,400 for furniture and fixtures and in the sum of \$53,000 for the building, the latter amount being based upon what they insisted would be the cost of replacement. The only dispute between the parties was as to the latter item. Respondent contended that the value of the building was \$75,000, but expressed a willingness and desire to have petitioners make the replacement. Under the terms of the insurance contracts the companies became liable to pay the amount of the loss not later than sixty days after proof of loss, or within one hundred and twenty days in all from the date of the loss. In the light of these facts it is immaterial whether Section 5972 or Section 5977 be invoked. In the absence of an authoritative state decision to the contrary, there was nothing in either which required the trial court in rendering its judgment to depart from the rule in respect of the allowance of interest which this court had recognized, namely, that, even in a case of

unliquidated damages, "when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages." Under the facts disclosed by the record, the principles established by these decisions fully justified the allowance of interest made by the district court in this case.

The case was argued by Mr. F. A. Rittenhouse for the petitioners and by Mr. Frank G. Anderson for the respondent on the question of interest.

#### State Statutes—Corporations—Equal Protection

The statute of Texas permitting suit against private corporations to be brought in any county in which the cause of action arose does not violate the equal protection clause of the Fourteenth Amendment, although unincorporated individuals may not be subject to suit outside their domiciliary counties in similar cases.

*Bain Peanut Company v. Pinson et al*, Adv. Op. 400; Sup. Ct. Rep.

In this case the appellant corporation, Bain Peanut Company, attacked a statute of Texas upon the ground that it violated the equal protection clause of the Fourteenth Amendment. It was sued and judgment recovered against it in Comanche County, Texas, in which County the cause of action arose. Its principal office was in Tarrant County. It duly raised the question as to the validity of the statute of Texas, allowing suits against private corporations in any county in which the cause of action arose, when unincorporated individuals are assumed not to be "subject to suit outside their domiciliary counties in a similar situation."

Although the Supreme Court first understood that the case had been disposed of by the Texas courts on grounds which it could not review, it later was made to appear that the judgment had been affirmed against the appellant over a fully stated objection to the constitutionality of the statute. Consequently, the merits of the case were considered, and the case was disposed of by the Supreme Court in an opinion by Mr. JUSTICE HOLMES.

Explaining the unsoundness of the objections raised, he said:

Coming then to the merits, we are of opinion that the judgment was right. The interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints. In deciding whether a corporation is denied the equal protection of the laws when its creator establishes a more extensive venue for actions against it than is fixed for private citizens we have to consider not a geometrical equation between a corporation and a man but whether the difference does injustice to the class generally, even though it bear hard in some particular case, which is not alleged or proved here. . . . This it is for the corporation to make out. The range of the State's discretion is large. . . . The question seems to be answered by *Cincinnati Street Ry. Co. v. Snell*, 193 U. S. 30, 36, 37, which lays down that if the protection of fundamental rights by equal laws equally administered is enjoyed, the Constitution does not forbid allowing one person to seek a forum from which another in the same class is excluded. But without asserting a universal proposition it is obvious that there is likely to be such a difference between the business done by a corporation and that done by a private person that the State well may take it into account when it permits a corporation to be formed. That the provision in question is reasonable is made more probable by the fact that it had been adopted and sustained not only in Texas but in other States. . . . We cannot say that it is not.

The case was argued by Mr. B. G. Mansell for the appellants, and by Messrs. Gib Callaway and Mark Callaway for the appellee.

## CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

### Among Recent Books

**L**A PROTECTION des populations civiles contre les bombardements: Consultations juridiques. 1930. Geneva. 254 pages.—The International Committee of the Red Cross, the humanitarian institution whose history and whose merits are well known to all, in response to the initiative of the German Red Cross has in its turn published this book the aim of which is to determine the most adequate legal means for freeing the world from the terrible dangers that may be entailed, in any future war, by the new scientific methods of bombardment not only from the very long range guns of indeterminate sights, already known in action during the last great contest, but also from dirigibles and airplanes equipped to spread asphyxiating gases and transmissible germs of mortal disease.

The authors of the important opinions contained in this book may be divided into two groups, that of the optimists and that of the pessimists. We are resolutely in accord with the first of these, since it is our feeling that, sooner or later, there is no good work that man will leave undone, and no effort that tends to the common welfare and happiness can be considered as lost. Law, which is the epitome of justice, at last conquers all the temptations and audacities that force attempts to impose.

There has, nevertheless, slipped into one of these works a very dangerous doctrine—that the will of the majority of the nations can and must be imposed on the minority. In order to appreciate this proposition, imagine the situation of the United States if they were obliged to respect the vote of the Great Powers with respect to that part of the Monroe Doctrine which prohibits Europe from acquiring territories in America. And this is but one of a thousand examples that instantly suggest themselves. An International Society is not possible without the absolute equality of all the nations that form it, and without recognition of the rule whereunder none of them can or must feel bound by the will and decision of the others.

The Red Cross, which originated to protect the victims of war and to prevent military excesses, fulfils its high mission with publications of this character. The knowledge of the horrors of chemical and air warfare must be widely disseminated, in order that public opinion may condemn them. Although the recent pacts, and among them, especially, the one known as the famous Kellogg Pact, are reducing its possibilities every day, it is necessary that when, unhappily, war does arise it shall take on the knightly and noble form that the Nineteenth Century gave it, and not, as in past epochs of history, the implacably cruel aspect of a scourge whose innocent victims are children, women, the aged, the infirm and even those who today find under the blessed symbol of the Red Cross the protection needed for them to do good amidst the ruins

of evil, and practice charity amidst hatred and desolation.

ANTONIO S. DE BUSTAMANTE Y SIRVEN.  
Havana, Cuba.

*The Law of Sales.* By Irving Mariash. 1930. New York: Matthew Bender & Co. Pp. xxii, 926.—The author sets forth the sections of the Uniform Sales Act and follows each with his own comment on the common and statute law. While there are some citations to English and general American authorities, the somewhat scanty references are almost entirely to New York and Federal cases. The footnotes are long, however, because they contain extended digests of cases, for the purpose, as stated by the author, of enabling lawyers, judges and students to decide whether the decisions are relevant, without the necessity of reading the official reports.

An appendix contains a number of the uniform acts and some business rules and regulations appertaining to commercial law. There is an index but no table of cases. The treatment of conditional sales is cursory, Mr. Mariash apparently making no effort to cover that important topic.

The strength of the book lies in its condensed, clear statement of some of the fundamental principles of sales law. Its weakness lies in its failure to exhaust the subject and its inadequate citation of authority. One may perhaps venture a doubt whether the views of any American writer on Sales (except Professor Williston) are of much value to the profession, unless supported by full references to decisions and statutes from which the reader can judge the soundness of those opinions.

GEORGE G. BOGERT.  
University of Chicago Law School.

*Cases in Constitutional Law.* By D. L. Keir and F. H. Lawson. 1929. Oxford: Clarendon Press. Pp. 479.—This collection of cases in English Constitutional Law is without a doubt the best available and it ought to supersede any of its competitors. First of all, the judgments are nearly all printed in full. Secondly, cases appear which bring the entire subject into line with modern life. Thirdly, the *lex et consuetudo parliamenti* does not protrude with illustrations which have more or less an historical interest when they have to be weighed in terms of available space against cases of vaster moment. Fourthly, each group of cases is preceded by an excellent introduction which sums up the law and guides the student to the cases concerned. He is thus driven, from a mere statement that some legal fact is governed by some case, to study the case itself, to find out the process of judicial reasoning, and thus incidentally to discover

that law is something more than a jumble of concepts and data.

As a new edition will undoubtedly be called for, we would like to suggest that the head-notes of the cases (or head notes) be given, that the section on the Dominions be revised after consultation with experts as it is not at all satisfactory, and that *Rex v. Christian*, (1924) A.D. 101 (South Africa) and *Jerusalem-Jaffa District Governor v. Suleiman Murra* [1926] A.C. 321, be included under mandates. These suggestions do not in the least detract from the value of the book, which will be useful not merely to the general student but to the practical lawyer. Its methods, selections, and editing are admirable, and the facilities provided in index and such like for quick consultation leave nothing to be desired.

W. P. M. KENNEDY.

Faculty of Law, University of Toronto.

*La Philosophie de l'Ordre Juridique Positif.* (The philosophy underlying the legal order in its positive aspect.) By Jean Dabin. 1929. Paris: Librairie du Recueil Sirey. Pp. viii, 791.—This considerable and impressive volume bears a title of which I have given a paraphrase in parentheses, since a translation is practically impossible. The subject-matter is further limited in the title by the qualification—"especially in its relation to civil law"—in which the phrase "civil law" is used in the sense which distinguishes it from public law or criminal law, but the limitation is not too strictly maintained. The book is the fruit of the lectures in legal philosophy which the author has delivered in the University of Louvain during the last ten years and is one of the many presentations of these fundamental questions which have appeared in France since the war.

There is no doubt about the basic doctrines or about the point of view of M. Dabin. He likes clear, precise notions and he believes they can be found in the law, and that upon a group of these precise general notions, the "positive law"—that is, the law as it proceeds from specific legislatures and courts and applies itself to given times and places—can be built up. It can also be built up without reference to these clear and precise notions, or even in contradiction to them, and to that extent it will be poor law or bad law, essentially unstable and ultimately to be replaced by sound law.

And, above all, he vigorously combats the doctrines of these jurists who, like MM. Duguit, Ripert, Hauriou, Kelsen, work in the opposite fashion, to whom the facts of social life are primary data and who derive their principles or legal ideas merely by formulating in more or less general terms the most successful of the solutions applied to social conflicts.

How much assistance we can derive from a book of this nature, will depend on what we are looking for. M. Dabin, as we might suppose, is very learned, but his learning, except for a French translation of Kelsen, an essay of Del Vecchio and some references to Meulenaere's translation of Ihering's *Geist*, is confined apparently to works of French writers. That is not without its value, since a great many of these writers are less known to Americans than the Germans and Italians are, and the abundant notes of the book will serve as a useful guide to an extensive and brilliant legal literature. The admirable work of Fr. Gény is of course frequently cited, and so are the excellent lectures of M. George Renard, and the more

systematic presentations of Carré de Malberg, Josserand, Bonnecasse and the older book of Demogue.

Whether M. Dabin would permit us to call him a neo-Thomist, I do not know. He rests quite securely, however, on the basis of Thomist ethics and, in methods as in fundamental ideas, is thoroughly scholastic. That is anything but a reproach, since we could do far worse than imitate the rigorous logic and the painstaking statement of opposing principles which scholastic dialectic took over from Aristotle and developed in its own way. Nor does M. Dabin remain out of touch with concrete social and legal facts. On the contrary, he cites cases constantly and in particular he deals with those present problems of lesion, prescription, responsibility for injuries, reparatory damages in specific cases, which are the real issues in present day legal discussion. There is none of the ill-digested and nebulous formalism of M. Picard's *Le Droit Pur*, which it is discouraging to see still seriously treated as a valuable contribution to legal analysis.

And yet, it may be that in his results M. Dabin can give us less guidance than in his sources and in his methods. The precise and clear notions on which he depends, he derives from natural law in the medieval sense, that is, from the conclusions to which right reason will lead the mind of a good man. But these are supplemented by Catholic morality, outside of which, as it is expressed in authoritative treatises and in the smaller catechism, M. Dabin frankly declares (p. 409) that morality does not exist. The point, however, which is obvious to most readers, is that this morality must be frequently applied to doubtful cases, and the long line of brilliant casuists, both Protestant and Catholic—not to speak of Jews and Mohammedans—demonstrates the existence of many such doubtful cases. M. Dabin need not trouble himself about them, because he can always find somewhere in his Church an authoritative solution of his difficulties.

One suspects, therefore, that the clearness and precision of his applications of general rules need such an unerring and always available human authority whose determination is final and unappealable. One can easily see, accordingly, that to M. Duguit, let us say, or to Herr Kelsen, who do not accept this determination as final, M. Dabin's rigorously logical method is of less use than it is to him.

On the specific question of "unjust laws," to which he devotes the last hundred pages of his book, M. Dabin takes us into the field, and to a large extent into the ideas, of the sixteenth and seventeenth century controversialists. We almost hear Bodin and Bellarmine, Buchanan, Grotius, Bucer and the *Vindiciae contra Tyrannos*. The problem, M. Dabin concedes, is difficult and perhaps insoluble. He is doubtless right, but he might have gone more deeply into the question if he had reviewed both these older polemicists and such newer views of conscientious illegality as those of Gustav Radbruch. At any rate, it is interesting to find that he concludes (p. 769) with the statement that, when a law is unjust, "order (sc. right order) will not be reestablished except upon the disappearance of the unjust rule, a disappearance which will be due to the efforts of good citizens, to their protest and—to speak plainly—to their resistance."

This is unadulterated Bellarmine. It is also the point of view of that writer in the "New Republic" who set forth the legal duty of liberals to disobey the Prohibition laws. The doctrine depends, one might

suggest, on the means we have of being sure that the rule is unjust.

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*A Treatise on the Substantive Law of Equity Jurisprudence.* By Fred F. Lawrence. Two volumes. 1929. Albany: Matthew Bender & Co. Pp. clxxiii, 1-632; xxii, 633-1407.—From time to time there have been published in England a considerable number of short treatises on Equity which seem to have an excellent market. The twentieth edition of Snell's Principles of Equity appeared in 1929. There have been fifteen editions of Smith's Manual of Equity Jurisprudence, seven editions of Indermaur & Thwaites' Manual, five editions of Strahan's Digest of Equity and two of Wilshire's Principles of Equity. The nineteenth edition of White & Tudor's Leading Cases in Equity appeared in 1928. In the United States there are also several treatises on the subject. In addition to Story's pioneer work, which has now run into fourteen editions, and Pomeroy's book, the leading American treatise, of which four editions have been published, there is Bispham's Principles of Equity, the eleventh edition of which has just appeared, and Clark's small treatise published a few years ago. Some of these books are written primarily for students; others, like that of Pomeroy, are written primarily for the legal profession. Mr. Lawrence states in his preface that his work "is submitted to the searching analysis of the legal scholar, and to the supreme test of merit, the day to day reference of the jurist and practitioner."

As a general survey of the broad field of Equity it is excellent; but the scope of the work makes it impossible to deal very fully with any part of the field. The real difficulties frequently begin where the author ends. He ignores many of the nice problems which have provided a fertile field for discussion in the law journals. The author, however, has done his own thinking. He does not merely cite cases. He depends too much perhaps on isolated phrases taken from the decisions, but he does not adopt the practice, so frequent in less thoughtful books, of simply repeating what the courts have said without attempting to analyze the ideas behind their words. His treatment is generally fresh, vigorous, clear and terse. Occasionally one finds a sentence in what might be called the ex-Presidential style, as where the author says in introducing the subject of fiduciary relationships that "Inequality of situation naturally tends to the disadvantage of one less favorably situated." Such infelicities, however, are rare. The book as a whole will give the student and scholar, the practitioner and judge, a good view of the scope of the work done by courts of equity and the way in which they do it.

AUSTIN W. SCOTT.

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*The Bench and Bar of Quebec.* By Hon. E. R. Surveyer and Dorothy A. Heneker. 1931. Quebec: Dominion Publishing Co. Pp. 32.—The legal profession in Quebec has established a fine reputation for learning and scholarship and has done its share in establishing the record for historical writing which is one of the greatest intellectual assets which that Province possesses. The monograph by Judge Surveyer

and Miss Heneker is well worthy of the established traditions. Soundly based in legal knowledge and research, and written in clear practical English, it presents an admirable and succinct view of the Bench and Bar in Quebec from the earliest days to the present time. Nowhere else perhaps in the new world exists such a romantic and continuous piece of legal history and it is all the more interesting because it discloses the survivals amid common law provinces of French civil law and procedure. There can be no doubt of the fact that these ancient traditions have fulfilled a remarkable social as well as legal function in Quebec and have done not a little to preserve the finest cultural and humanistic traditions in the face of the exacting calls of modern materialism. We congratulate the learned authors, not merely on the scholarly attainments to which their monograph bears witness, but on their connection with a bar which has so served the general social purposes of a beautiful civilization.

W. P. M. KENNEDY.

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University of Toronto.

*Methods in Social Science.* The report of the committee on scientific methods in the social sciences of the Social Science Research Council. Stuart A. Rice, editor. 1930. Chicago: The University of Chicago Press. Pp. xiii, 822.—Not a few moralists and persons of high character and broad culture have been proposing a "holiday" for the exact sciences, in order to give the social sciences, admittedly inexact, time to catch up and to translate their main conclusions into political and social policy.

What, then, is the matter with the social sciences and with our civilized societies? Why are the social sciences neglected and ignored by practical men and by governments? Are they at bottom unscientific? If so, what is wrong with their methods and with their processes?

These questions have been asked lately by many intelligent men. The answers elicited are not wholly satisfactory. Perhaps the solid and remarkable volume under notice will throw, indirectly, some light on the vital and grave problem. For it deals with the question of method in the social sciences. It shows just how certain thinkers, great and small, have arrived at their conclusions. It presents no fewer than fifty-three intelligent interpretations of the methods employed in sixty-odd notable contributions to social science. The ground covered is large. The analyses start with Comte and end with the Wuerzburg school of psychology. History, anthropology, economics and sociology furnish several of the contributions selected for treatment.

The editor supplies an illuminating introduction to the volume, while the analysts and others—in some cases the authors analyzed—give the reader generous aid toward grasping the motives and objectives of the enterprise.

Thus the book is itself an example of the case method. It does not attempt to pass final judgment; it provides materials for judgment. The analysts are not all sternly objective; some indulge in high praise and even enthusiastic eulogy, but, on the whole, the effort is to elucidate, expound, disclose logical and methodological connections.

The committee was undoubtedly wise in deciding to present carefully studied cases rather than to de-

fend a particular thesis or particular method. But it is aware of the fact that the volume is only the first of a series of much needed documents, and one which fairly begs for a companion volume—a competent and authoritative study of method in social science from a rigorously scientific point of view. Why have certain eminent thinkers lost ground and failed to establish their theories? What was wrong with their logic, or other premises, or their data? Critical analyses of Hegel, Spencer, Marx, Henry George, Proudhon, Lombroso, Watson, by men and women of recognized ability and adequate scholarship, would be welcomed by thousands of thoughtful lay persons interested in social science and in specific measures of social reform advocated in the name of science. Such analyses might help us to weigh and assess current contentious proposals, public ownership, the referendum and recall, compulsory unemployment insurance, retention of the Volstead prohibition law, the censorship of the drama, the six-hour day, abolition of the direct primary, etc.

The professors of the social sciences often disagree, of course, but so do the professors of and workers in the natural or exact sciences. What we need today in social science is plenty of courageous criticism, experimentation and candid controversy.

VICTOR S. YARROS.

Chicago.

*A devolução nos conflitos sobre a lei pessoal.* By Haroldo Valladão. 1930. São Paulo: Empreza Graphica da "Revista Dos Tribunaes." Pp. 93. This inaugural dissertation of the new Professor of International Private Law of the University of Rio de Janeiro treats briefly yet with great industry and exhaustive erudition the ever-difficult question of the conflict between the domicil and the nation as the source of personal law. Though some attention is paid to jurisprudence (only too few Brazilian decisions are cited) the authorities chiefly examined are the writings of European jurists, from Germany, France, Spain and Italy, with a few references to the English authorities, and always with due consideration to the opinions of our good neighbor de Bustamante. The writings of several earlier Brazilian authors are carefully examined. The discussions concerning the doctrine of *renvoi* are carefully summarized. The late authoritative works of Potu and of Frankenstein are examined; it would be too much to expect that writings on this subject in the United States, mostly in periodicals, should be familiar to the Brazilian jurist. It is to be hoped, however, that this little book may be the means of making our work and that of the jurists of our largest southern neighbor more familiar to one another.

J. H. BEALE.

Harvard Law School.

*Outlines of Public Utility Economics*, by Martin G. Glaeser. (1927). New York; The Macmillan Company. Pp. xxvi, 847.—This volume, as the title indicates, is introductory and suggestive rather than an exhaustive analysis of public utility economics. It is a broad and comprehensive survey of the whole field of public utilities on the economic side.

The approach is historical and economico-legal; an effort is made to show the evolution of the industry in order to give the setting for the present-day problems

arising out of regulation, and the changing status of the industries. Railroads are included with local utilities, since the conditions common to all utilities, national or local, are the basis of the study. In such presentation, the author's years of first-hand experience on the staff of the Wisconsin Railroad Commission, supplemented by the scholar's grasp of economic theory as applied to public utilities, give the book a systematic, scientific quality that is one of its chief assets.

The central unifying idea, bringing the discussion into a cohesive pattern, is the analysis of public utilities in terms of the "going concern" as an economic institution. In contrast to the legal framework, which is the collectivity of stockholders, the "going concern" as an economic organization includes all those having economic relationships with the utility—customers, supply firms, bondholders, officers and employees, as well as the shareholders—all of whom are interested in maintaining "the profitable, continuous and efficient rendition of service."

To insure such rendition of service, those in charge of the management and regulation of public utilities must coordinate the flow of transactions among the different classes of members according to reasonable working rules. This necessitates continuous study of, and adaptation to, the varying conditions of investment bargains, price bargains, labor bargains, tax bargains, and rate bargains which public utilities must enter upon again and again in the conduct of their business.

Since the working rules, under our system of regulation, are largely determined by administrative and statute law, the legal aspect is emphasized throughout, and the author's contact with practical regulation is everywhere evident both in his point of view and in the illustrative material introduced. There is no defense of any particular government policy, though in the sections on valuation it is clear that the author is not in accord with the current "reproduction cost" theory, but leans rather to the "prudent investment" theory as enunciated by Mr. Justice Rosenberg of Wisconsin and Mr. Justice Brandeis of the Supreme Court: "the true economic standard for determining the rate-base is the investment standard."

In connection with the rate of return, he makes the point "that the rate of return should be made flexible so the return on the risk capital of public utilities shall bear some constant relation to the varying purchasing power of the dollar." But his discussion of rate-making, as a whole, leaves something to be desired, for although he says "the process of determining a rate-base is merely an incident in the larger process of rate-making, which is valuation of public utility services", he goes on to discuss rate-making and valuation as separate and independent processes. In general, however, he gives a thorough and critical comparison of conflicting views in regard to rate-making, valuation, depreciation, control of security issues, and financial policies. He concludes with a discussion of the more recent trends in public policies affecting utilities.

Original material of special value is introduced in the chapter on service at cost, which embodies the result of a public utility survey made by the author in Milwaukee, formulated in a "cost of service" ordinance.

PETER LEININGER.

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## Leading Articles in Current Legal Periodicals

*Journal of Criminal Law and Criminology*, May (Chicago)—Success or Failure on Parole can be Predicted, by Clark Tibbitts; State Organization for Penal Administration, by Clair Wilcox.

*Law Quarterly Review*, April (Toronto, Can.)—Economic Theories in English Case Law, by D. Hughes Parry; The Comparative Law of the Right to Privacy; I. The Law of Germany and Switzerland, by H. C. Gutteridge; II. The French Law, by F. P. Walton; The Evolution of the Liability of the Common Carrier in Modern Railway Law, by J. D. I. Hughes; Nachimson's and Hyde's Cases, by S. G. Vesey-FitzGerald; Renvoi and Succession to Movables (continued), by John D. Falconbridge.

*Washington Law Review*, May (Seattle, Wash.)—Federal Court Judgment Liens, by Marion Edwards; Waiver of Patient's Privilege, by DeWolfe Emory.

*Air Law Review*, April (New York City)—Origin and Development of Radio Law, by William J. Donovan; The Empire State Building Mooring Mast, by Charles Pickett; The Regulation of Amateur Radio Communications, by Paul M. Segal; The Collective Aeronautical Conventions and the Possibility of Their Unification, by Salvatore Gacopardo.

*Columbia Law Review*, May (New York City)—Restrictive Patent Licenses and Restraint of Trade, by Alfred McCormack; Case and the Statute of Westminster II, by Theodore F. T. Plucknett; The Restatement of the Law of Trusts, by Thurman Arnold; Legal Realism, by Max Radin.

*Harvard Law Review*, May (Cambridge, Mass.)—Deviation from the Terms of a Trust, by Austin Wakeman Scott; Corporate Powers as Powers in Trust, by A. A. Berle, Jr.; State Jurisdiction of Income for Tax Purposes, by Henry Rottschaefer.

*Illinois Law Review*, June (Chicago)—A Minnesota Judgeship, by Kenneth C. Sears; The Illinois Dower Act by Samuel Fox; The Illinois Dower Act—A Comment, by William L. Eagleton; A Proposed Correction of the Illinois Statute to Facilitate Extradition, by Abraham Drucker; Restatement of the Law of Contracts—Illinois Annotations, by Harold W. Holt.

*Georgetown Law Journal*, May (Washington, D. C.)—The Dartmouth College Case, by Horace H. Hagan; Jurisdiction to Tax Debts, by Charles L. B. Lowndes; Trial Experiences, by Martin Conboy.

*Notre Dame Lawyer*, May (Notre Dame, Ind.)—Our Changing Jury System, by Walter Burgwyn Jones; The Supreme Court Plays at "This is the House That Jack Built," by Forrest Revere Black; The Nature of Possibilities of Reverter, by William Sternberg; Legal Versus Moral Justice, by Charles C. Miltner.

*Canadian Bar Review*, May (Toronto)—More Anomalies in the Law of Wagering Contracts, by John D. Falconbridge; Reform of Civil Procedure, by J. J. F. Winslow; The Doctrine of Hot Pursuit, by J. Stafford H. Beck.

*Virginia Law Review*, May (Charlottesville, Va.)—The Thirty Years' War on the Supreme Court, by Charles Kerr; The Supreme Court and State Police Power, by Thomas Reed Powell; Meaning of the Term "Public Interest" in the Federal Trade Commission Act, by Thomas H. Malone.

*Law Notes*, May (Northport, N. Y.)—The Right of Privacy, by Joseph T. Buxton, Jr.; Right of Self-Defense by an Officer Who Kills While Attempting an Illegal Arrest, by Arthur B. Shepherd; Payment of Fine in Criminal Cases as Affecting Right to Review Conviction, by Berto Rogers.

*Cornell Law Quarterly*, April (Ithaca, N. Y.)—Lands Under Water in New York, by William Shankland Andrews; Principles of Bailment, by William King Laidlaw; Remission and Transmission in American Conflict of Laws, by Lindell T. Bates; The Joint Enterprise Doctrine in Automobile Law, by Joseph Weintraub; The Hoch-Smith Resolution and the Consideration of Commercial Conditions in Rate-Fixing, by Harvey C. Mansfield.

*Minnesota Law Review*, May (Minneapolis, Minn.)—Counsel Fees and Other Expenses of Litigation as an Element of Damages, by Charles T. McCormick; The Law of Joint

Adventures, by Frank L. Mechem; Conflict of Laws as to Domicil: The Restatement and Minnesota Decisions Compared, by Francis J. Putnam.

*University of Cincinnati Law Review*, May (Cincinnati, Ohio.)—Extent of Power of Congress over Aviation, by Alonzo H. Tuttle, Dale E. Bennett; Power of the Ohio Supreme Court to Declare Laws Unconstitutional, by Carl L. Meier; Legal Framework of International Society, by Harold M. Vinacke.

*Yale Law Journal*, May (New Haven, Conn.)—The Right of a Defaulting Vendee to the Restitution of Installments Paid, by Arthur L. Corbin; The Business Failures Project—II. An Analysis of Methods of Investigation, by William O. Douglas and Dorothy S. Thomas; Legal and Institutional Methods Applied to the Debating of Direct Discounts—V. The New York Study, by Underhill Moore and Gilbert Sussman.

*Rocky Mountain Law Review*, April (Boulder, Colo.)—Charles S. Thomas: The Tall Sycamore of Cherry Creek, by William H. Robinson, Jr.; The Plea of Want of Consideration in Colorado, by John H. Denison; Contractual Rights of Persons Not Parties to the Contract in Colorado, by William Brophy.

*Kentucky Law Journal*, May (Lexington, Ky.)—Testamentary Dispositions, by Percy Bordwell; Nullity of Marriage for Fraud, by Leonard J. Emmerglick; Dual Regulation of Commerce, by Louis Cox; The Power of Congress to Declare Peace, by Forrest R. Black.

*St. Louis Law Review*, April (Fulton, Mo.)—Legal Technique and National Control of the Petroleum Industry, by Ralph F. Fuchs; Legal Obstacles to Business Tendencies, by W. F. Gephart.

*Marquette Law Review*, June (Milwaukee, Wis.)—"Expressio Unius Est Exclusio Alterius," by Clifton Williams; Stopping Checks, by Carl Zollman; Application of Parol Evidence Rule Under Wisconsin Fraud and Warranty Cases, by Irving Puchner; Business Trusts, by F. Lloyd Symmonds.

*St. John's Law Review*, May (Brooklyn, N. Y.)—Sociology and the Law, by Edward J. O'Toole; The Democratization of the War-Making Power, by Forrest Revere Black; Limitations of Actions in Equity in New York, by Maurice Finkelstein, Allen K. Bergman.

*United States Law Review*, May (New York City)—The Trust Company as Bankruptcy Receiver, by Joseph W. Kaufman; Operation of a Public Utility After Expiration of the Franchise, by Roy H. Owsley.

*The Journal of Radio Law*, April (Chicago)—Construction of the Equality Clause in the Davis Amendment, by Keith Masters; The Right of the Author with Respect to Broadcasting, by Dr. W. Hoffmann; State and Municipal Regulation of Radio, by John W. Van Allen.

Departments: General Orders of the Federal Radio Commission, by Arthur W. Scharfeld; Digests of Reports of Examiners of the Federal Radio Commission, by Howard W. Vesey; Statements of Grounds for Decision by the Federal Radio Commission, by Arthur W. Scharfeld; Pending Radio Litigation in the United States, by Fanney Neyman; Radio Decisions in the United States, by John W. Guider; Radio Legislation in the United States, by Philip G. Loucks; Foreign Radio Decisions, by Carl Zollman; Foreign Radio Legislation, by Carl Zollman; International Radio Chronicle, by Louis G. Caldwell; Bibliography of Radio Law, by Robert Kingsley; Book Reviews, by Robert Kingsley.

### Signed Articles

As one object of the AMERICAN BAR ASSOCIATION JOURNAL is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this JOURNAL assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

# STATESMEN, LAWYERS AND BOOKS

Some Reading and Non-reading Public Men—Washington, Lincoln and Governor Smith—  
Macaulay the Omnivorous Reader—Fondness of Both President Wilson  
and President Hoover for Detective Stories—Sir William  
Harcourt's Devastating Parody

BY WALTER P. ARMSTRONG

*Member of the Memphis, Tennessee, Bar*

"I BELIEVE Mr. Lloyd George can read, but I am perfectly certain he never does." The wit who flung this gibe at the former Prime Minister expressed what is, to some extent at least, the popular view as to the incompatibility between reading and public affairs.

Lord Roseberry, who as a book-loving Prime Minister was himself one of the exceptions, said that it was one of the rarest of all combinations and quoted Walpole's remarks to a friend: "You can read. It is a great happiness. I totally neglected it when I was in business, which has been the whole of my life, and to such a degree that I can not now read a page—a warning to all Ministers."

In this country the list of non-reading public men is headed by Washington and Lincoln.

Washington mentions having read before the Revolution a history of England, and the "Spectator." With these exceptions his reading, up to that time, was apparently confined to books on agriculture, though perhaps not with the same strictness as that of Parnell, who was said never to have read any book but "Youatt on the Horse." After his return from the army Washington became a consistent buyer of books—chiefly those dealing with biography and military history. It is probable, however, that most of these were shelved to be read in the hoped for leisure which apparently he never found; for in 1797, after his retirement from the Presidency, he wrote to a correspondent: "It may strike you that in this detail (of how he occupied himself) no mention is made of any portion of time allotted to reading. The remark would be just, for I have not looked into a book since I came home, nor shall I be able to do it until I have discharged my workmen; probably not before the nights grow long when possibly I may be looking into Doomsday book."

Edgar Lee Masters classes the popular conception of Lincoln as a reader with other "myths" about him, and says that, while he was an indefatigable newspaper reader, he cared little for books; and lists the famous books that were published after Lincoln reached his maturity, and when he had ample time for reading, but which he apparently ignored.

Governor Smith, therefore, need not lack distinguished precedents, if he is correctly reported by a friendly biographer: "I never read books. I never have read books. In all my life I have never read for amusement or to pass away the time. Life furnishes me with all the thrills."

But, if Governor Smith has allowed his absorption in public affairs to exile him from books,

statesmen who have been notable readers have not gone to the other extreme. The classic Eighteenth Century exemplar of a man of affairs who was also a man of books was Chesterfield, the "little tea table scoundrel," as George II. called him. Yet solemnly he advised: "Lay aside the best book whenever you can go into the best society, and, depend upon it, you change for the better."

The greatest reader of them all was probably Macaulay who is remembered as a bookman among statesmen, and whose record as a Cabinet Minister is, as a result, often forgotten. He is said to have memorized "Paradise Lost." Like Dr. Johnson he devoured whole libraries, and he himself records that on a voyage to India he read "insatiably, the Iliad, and Odyssey, Virgil, Horace, Caesar's Commentaries, Bacon's De Augmentis, Dante, Petrarch, Ariosto, Tasso, Don Quixote, Gibbon's Rome, Mill's India, all the seventy volumes of Voltaire, Sismondi's 'History of France' and the seven thick volumes of the 'Biographia Britannia.'"

A close second to Macaulay was Gladstone, who of statesmen of the first rank was the most bookish; and in the same class are William Pitt and Charles Fox. Pitt, however, can not claim the title of a real book-lover. He did, it is true, excel in the classics. Of him in college it was said that "his only cricket was a hexameter, and his only football, an ablative absolute." It was the order of the day that speeches in the House of Commons should be adorned with Latin and Greek tags, and for this Pitt conscientiously fitted himself as for the other duties of statesmanship. He read to the exclusion of other pursuits that he might the sooner claim his inheritance as a statesman and the more effectively debate; Charles Fox, on the other hand, who was a genuine bookman, left his books and his garden for the House of Commons, almost with tears.

Fox ranged over the entire field of literature. Like Gladstone he was a devotee of Homer. But not only the classics, but English poetry, history and all the novels he could get he read incessantly and discussed for hours to the exclusion of politics.

Like Fox in the catholicity of his taste was Theodore Roosevelt, another consummate man of affairs, who was an omnivorous reader. Roosevelt in his reading unconsciously followed the advice of Henry Ward Beecher: "You read a book as you eat fish: cut off the tail, cut off the head, cut off the fins, take out the backbone, and there is a

little meat left which you eat because it nourishes you."

This method and his practice of always having a book at hand and dipping into it when otherwise unoccupied enabled Roosevelt to astonish the authors whom he delighted to entertain at the White House with his knowledge of their books.

In this gallery of constant readers one would expect to find those editors who have strayed into public life. Often it was their love of books which determined their vocation. Whitelaw Reid's mother liked to tell how when, as a boy, he was put to plowing, like Bobbie Burns, he would be found, leaning against the handles, buried in a book.

In after life this taste never left him and he "loved anything that was in a book. He could read theology or a Patent Office report, a novel or a history, with avidity."

Like Reid, Northcliffe was an eager and assiduous reader. His love of reading was a part of his universal curiosity and he read deeply and upon many subjects. Upon his last voyage to the United States he read and annotated the "Politics" of Aristotle. He loved the prose of the Eighteenth Century—the prose of Fielding, Smollett and Sterne; but it was history that most deeply fascinated him. Among modern novelists Thomas Hardy was his favorite, and he would measure the intelligence of the English and Scottish towns he visited by the simple method of inquiring whether the bookstores carried Hardy's novels. Apparently, he did not require in his reading those qualities of popular appeal that, under his guidance, made his newspapers so enormously successful.

Northcliffe, in fact, was a journalist reading for information; and he would probably have subscribed to the didacticism of Bryce, who was a student in politics, that "life is too short for reading inferior books."

Of this type of readers with a purpose were Rufus Choate, Henry Clay, John C. Calhoun and Daniel Webster, men who, as Joseph H. Choate said, needed no counter-irritant to draw the pain from a hurt mind.

The most extreme instance, among public men, of such conscientious readers was Lord Chatham, who boasted that he had twice read through Bailey's dictionary, a feat unique among statesmen, though paralleled among writers by Browning, Stevenson and Kipling.

In the land of letters not all men of public affairs have been such travelers with definite destinations; some have been vagabonds led by their fancies. Hear former Prime Minister, Stanley Baldwin, speaking as president of, and to, the English Association:

"I can look back through the ages to a small boy. I can see him far away in Worcestershire, reading all day in that most comfortable attitude, lying on his stomach on the hearthrug in front of the fire. . . .

"When I look back on those far distant years I think I can recognize my own good fortune, which may have been shared by many here. I was left to myself to find my own provender in the library.

"The first sustenance I had was Scott. I was left alone in the country, sometimes for long periods with an aunt who was fond of being read

aloud to, and I read aloud to her by the time I was nine years of age the whole of 'Guy Mannering,' 'Ivanhoe,' 'Red Gauntlet,' 'Rob Roy,' and 'The Pirate.' I learned through Scott or I owed to him my first introduction to poetry. I was not a great reader of poetry as a small boy. That came later; but I lived for a time in those early days on 'The Lay' and on 'Marmion.' I can see myself striding along the country lanes—reciting long passages. . . .

"Mr. Baldwin said that all these years he had sought for peace and had never found it save in a nook with a book. Back to that nook sometime he would go. And when he died he had no higher ambition than that of his cousin, Rudyard Kipling. If the first people to greet him in the next world should be good Sir Walter and Jane, and might he add, a little Shubert music, who so happy as he, provided only that afterwards he might sit in a corner for a real good talk with Mrs. Gamp."

Evidently Mr. Baldwin was not merely intimidated by fear of lèse-majesty when, on another occasion, and to a Scottish audience, he referred to Sir Walter as the Homer of Scotland, almost of modern Europe.

Mr. Baldwin is not singular in his love for Scott; Whitelaw Reid and Lord Beaverbrook shared it; John W. Davis allows himself an occasional quotation from the master; and Chauncey M. Depew, in his autobiography, says: "No pleasure derived in reading in after years gave me such delight as the Waverly Novels. I think I read through that library and some of it several times."

Some have sought provender lighter than that offered by Scott. Woodrow Wilson, who typified the scholar in politics, once confessed that he had not read a serious book in fourteen years, saying, "Detective stories are the only ones that hold me."

This is one Wilsonian precedent from which Mr. Hoover may not depart; for in other years when, as an engineer, he was journeying to the ends of the earth, his cabin was often fitted up as a miniature library, with a plentiful supply of detective stories for which, according to his friend, Will Irwin, he has an incurable addiction.

Even more surprising is the fact that so profound a reader as Mr. Justice Holmes, when surfeited with law and philosophy, turns for relaxation to French fiction, and that no man in his day drew so many books from the Congressional Library as did Boies Penrose.

More in character was the taste of Harding. Like Lord Palmerston, who mentions no favorite but "Coningsby" in his correspondence, he was a man of one book; his choice was Edgar Saltus' "Imperial Purple," a picture of Rome of the decadent empire.

The uses to which these men have put their reading have been as various as their tastes. For Northcliffe it was a storehouse of information; for Bryce the raw material of scholarship; for Pitt and Charles Sumner it was in different ways a means of elaborate ornamentation; for Asquith the road to a classic style; for Birkenhead an inspiration for the mordant phrase; for Winston Churchill the education which he neglected to obtain at school. Most have attempted to use it for allusion and quotation. Not all these efforts have been successful. There is no reading more dismal than those

eulogies of deceased Congressmen that with their hackneyed quotations help bloat the "Congressional Record" and lend an added horror to death.

Sometimes, however, the effect is all that could have been desired. How could John Randolph of Roanoke have more effectively characterized the alleged bargain between Henry Clay and John Quincy Adams than by drawing upon "Tom Jones" and calling it the "coalition of Blifil and Black George—of the Puritan with the blackleg?"

But to Sir William Harcourt, speaking in the House of Commons, goes the palm for the most devastating use of quotation. Sir. R. Knightley, a

country gentleman of the old school, spoke at length and touched upon his own long and distinguished ancestry. In reply Harcourt parodied Addison's lines about the moon:

"And (K)nightly to the listening earth  
Repeats the story of his birth."

To the public men who belong to the authentic guild of readers these uses are merely incidental. They read for the same reason that Kipling's Tommy Atkins kept wandering: because the urge is in them; because, though it may never have done any good to them, they can't stop it if they tried.

## OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES

### Opinion 29

**Security for Fees.**—To secure his fees for litigating the right to certain property, an attorney for one of the litigants may properly take title to the property only if he takes it subject to the rights of the adverse party, as finally determined by the Court.

A member submits the following statement and questions:

A, an attorney, was employed by W to bring suit against X to cancel and rescind a real estate transaction in which W had purchased a hotel property from X. Rescission was sought on the ground that X had induced the transaction by means of false and fraudulent representations. As part of the consideration for the hotel property W had deeded to X certain land in Canada. If a decree of cancellation and rescission were entered, it would require X to reconvey the Canadian land to W. After trial, the court denied the rescission, but refused to dismiss the action on the ground that plaintiff, W, was entitled to recover damages. W then filed a motion for a new trial, which was granted.

Shortly after the trial, and before the motion for a new trial had been granted, W heard that X was trying to sell the Canadian land, and, upon inquiry, discovered that X had deeded the land to his attorney, B, who had represented him in the trial. B had full knowledge of the fraud claimed but asserts that he took the deed to insure the payment of his fees.

May B properly attempt to convey the land to an innocent purchaser for value so as to get his fee in cash?

In the event that the court finds that the plaintiff is entitled to relief and enters a decree of rescission requiring X to reconvey the Canadian land to W, can B claim the land, or a lien thereon, on account of fees due him from X?

The Committee's opinion was stated by Mr. EVANS:

It was proper for B to accept a conveyance of the land in question for the purpose of securing his fees and disbursements, only if he accepted it to be held subject and junior, in all respects, to the rights

of W, as finally adjudicated by the Court. Therefore, it would be improper for B, unless the litigation be finally determined in favor of X, to convey the land to an innocent purchaser for value, since the right to the property is before the court and B, as an officer of the Court, cannot properly do anything that may interfere with the execution of the decree of the court.

As any and all claims of B in or to the land in question, even if conveyed to him and standing in his name, are subject and junior to the rights of W, as adjudicated by the Court, B cannot properly claim the land, or any lien thereon, if the Court orders that it be reconveyed to W.

### Opinion 30

**Employment—Attorney in Public Employ.**—A public prosecutor in one state may not properly defend a person accused of crime in another state.

In many communities it is the custom for public prosecutors to continue their private practice while holding that office. The salaries paid such prosecutors are usually small and because their public duties do not require all their professional time and there is no statutory prohibition against their doing so, they have adopted this method of augmenting their income. Some states even give recognition to the custom by statutes restricting the extent of their private practice.

The statutes of a certain state provide that a prosecuting attorney, while holding public office, shall not defend, in the courts of the state, any person accused of crime. The Committee is asked to determine whether it is proper for the prosecuting attorney of a county in that state, to defend, in the courts of an adjoining state, a resident of his own state who has been indicted in the adjoining state, the attorney having been retained for that purpose before his election to public office.

The Committee's opinion was stated by Mr. HARRIS, Messrs. Howe, Hinkley, Evans, Gallert and Strother concurring.

The Committee is of the opinion that a Prosecuting Attorney, upon his election or appointment

to that office, should promptly withdraw from the defense of a person indicted in an adjoining state.

The preamble of the Canon of Professional Ethics reads as follows:

"In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.

"No code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The following canons of ethics are adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned."

The second paragraph of Canon 6 states that:

"It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests, when in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."

The last sentence of Canon 29 respecting a lawyer's duty to uphold the honor of the profession, is as follows:

"He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice."

It is a well known fact that prosecutors are granted courtesies and assistance by the police departments, as well as the prosecuting authorities, of other cities and counties throughout the country. This practice is of great benefit to the administration of criminal justice. If prosecutors indulged in the practice of defending criminals in states other than their own, this helpful cooperation might easily and quickly be withdrawn. Other evils, detrimental to the proper enforcement of criminal laws, are not difficult to conceive, were prosecutors also acting as defenders of those accused of crime. Subjectively, the effect of such a practice upon the prosecutor himself must, in our opinion, be harmful to the interest of the public, whose service is the prosecutor's first and foremost duty.

Again, the honor and dignity of the profession of the law, and its place in public esteem, would, we believe, be lowered by such conduct. In Canon 31, of the Judicial Ethics, we find the following statement regarding the practice of law by judges in those jurisdictions where a judge is not required by law to give his entire time to his judicial duties:

"In such cases one who practices law is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice whereby he

utilizes or seems to utilize his judicial position to further his professional success."

We believe this statement can also properly be said to apply to prosecutors, who should, even at personal financial sacrifice, be and remain above suspicion.

### Opinion 31

**Practice of Law—Preparing articles of incorporation, by-laws and papers for exchange of stock for property or services is "practicing law."**

**Lay Intermediaries—Attorney cannot properly aid lay intermediary in practicing law by accepting employment from it to do legal work for its patrons.**

**Advertising—Improper for an attorney to permit the use of his name on the printed letterhead of a lay organization which solicits "law practice."**

An attorney in general practice is counsel for a corporation engaged in the business of incorporating companies, qualifying foreign corporations to do business in various states and acting as resident agent of corporations in such states. The corporation solicits business from laymen, advertising that its services include (1) the preparation, examination and filing of Articles of Incorporation in the various states, (2) the preparation of by-laws, (3) the preparation of minutes of meetings and (4) acting on proposals for the issuance of stock in exchange for property, services or other assets.

The attorney requests an opinion as to whether, under the circumstances mentioned, it is proper for him to permit the corporation to print his name on its letterheads and advertising matter as its general counsel. Would the answer be varied if he were a full time salaried official of the corporation?

The Committee's opinion was stated by Mr. GALLERT:

The preparation of articles of incorporation, of corporate by-laws, and of the necessary papers for the exchange of corporate stock for property or services, seems clearly to require both knowledge of the law and the application thereof, and the Committee does not believe that there is any question but that such conduct is "practicing law."

In our opinion, it is improper for an attorney to aid a corporation to practice law, or in any way to participate in or sanction such practice, and it is, therefore, improper for him to allow his name to be displayed on the letterheads or advertising matter of such a corporation. Furthermore, the solicitation of "law practice" is contrary to Canon 27, not only when it is done by the lawyer but also when he acquiesces in the use of his name in connection with such solicitation by others.

The conclusion would not be different if he were a full time salaried officer of a corporation soliciting "law practice." An attorney may properly, for a salary, devote his entire time to the performance of legal services for a corporation, provided the legal services performed concern only the corporation's own affairs, but when he allows it to sell his professional services, he violates Canon 35.

### Opinion 32

**Lay Intermediaries—An attorney cannot properly be associated with or employed by a layman, who is admitted**

to practice in the Patent Office, when that layman does business under the name of a firm which represents itself to be "attorneys" and "solicitors in patent causes."

A matter has been presented to the Committee which has required it to determine whether an attorney may:

(1) Properly be associated with or be employed by a firm of patent agents, known as "A. B. Blank & Company," who refer to themselves as "attorneys," the owner of the company not being admitted to practice as a lawyer but only admitted to prosecute claims in the Patent Office.

(2) Properly be associated with or employed by and have his name on the letterhead of a firm known as "Blank & Blank," who refer to themselves as "counselors in Patent Causes," although the proprietor of that firm is not an attorney at law but is only admitted to prosecute patent applications in the Patent Office.

The Committee's opinion was stated by MR. STROTHER.

Under the circumstances stated an attorney may not properly be associated with or employed by a layman, as such association or employment would be in violation of the spirit of Canon 33 of Professional Ethics cautioning against partnerships between lawyers who are not all admitted to practice in the local courts, requiring care to be taken to avoid misleading representation tending to create a false impression as to the professional position or privileges of the non-admitted member, prohibiting partnerships with one not a member of the legal profession, and prohibiting holding out as a practitioner one not admitted to practice law and the use in a firm name of the name of a person not admitted to such practice. If the attorney be an employee of a person not admitted to practice law, Canon 35 is infringed, in that the *employee's* services as a lawyer are controlled or exploited by a layman or lay agency, which intervenes between him and the client, or may do so. Furthermore, his acquiescence in the use of the word "attorneys" by a firm, the owner of which is not an attorney at law, is to be condemned because such designation is unwarranted, misleading and apparently intended to deceive the public.

For the same reasons, an attorney may not properly be associated with or employed by a firm which holds itself out as being "Counselors in Patent Causes," when the proprietor of the firm is not an attorney at law. The words "Counselors in Patent Causes" imply that the persons using them are entitled to prosecute cases in the courts, so that their use by a layman is a misrepresentation. Aside from any sanction given such misrepresentation by the use of his name, we have heretofore held, in Opinion 30, that an attorney cannot properly allow his name to be used on the letterhead of a corporation which attempts to practice law. The same rule applies to any lay organization which holds itself out as engaging in the practice of law.

#### Opinion 33

**Employment—A law firm cannot properly accept any employment which previous relations prevent a partner from accepting.**

In 1903, A, an imbecile, employed the partnership of X & Y to annul her marriage. The part-

nership was paid a fee by A's next friend, and action was instituted to annul the marriage upon the principal ground of A's imbecility. The actual trial was conducted by Y, but X appeared personally in various matters having to do with the preparation and filing of the decree.

Thereafter the partnership of X & Y was dissolved and X formed a new partnership with C, known as X & C.

In 1928 A, acting through her guardian, brought suit against B to cancel a deed secured from her, the basis for the suit being her alleged imbecility at the time of the execution of the deed. X & C accepted employment to represent B but X took no part in the trial of the cause. The case resulted in relief being accorded A as prayed for and appeal by B is now pending.

The questions presented are (1) whether it was proper for the firm of X and C to accept employment to represent B and (2) whether X can now properly represent B on the merits of the cause in the appellate proceedings.

The Committee's opinion was stated by MR. GALLERT, Messrs. Howe, Hinkley, Harris, Evans and Strother, concurring.

Canon 6 provides that "The obligation to represent the client with undivided fidelity . . . forbids the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client in respect to which confidence has been reposed."

A firm of which X was a member, having acted for A, in an action to procure relief on the ground of her imbecility, all the members of that firm and of every other firm of which any one of them may become a member are prohibited by Canon 6, from subsequently accepting employment to maintain that she was not an imbecile at the time of the first suit, or to affect the decree obtained in the first suit adversely to the interest of their client therein. The relations of partners in a law firm are so close that the firm, and all the members thereof, are barred from accepting any employment that any one member of the firm is prohibited from taking.

#### Opinion 34

**Employment—Attorney in Public Employ—Propriety of city attorney defending persons charged with crime.**

The Committee has been requested, by a State Bar Association, to express its opinion as to whether a City Attorney, who continues in private practice during his term of office, and who is not required by statute to give his entire time to the duties of that office, may properly represent persons who are charged with crime and arraigned in the City Court of that city and who are later indicted and held for trial in the Criminal Court of the county in which the city is located.

The opinion of the Committee was stated by MR. HINKLEY, Messrs. Howe, Evans, Harris, Gallert and Strother, concurring.

We have heretofore, in Opinion 30, stated that it is the duty of an attorney in public employ to be and remain above all suspicion, even at personal financial sacrifice.

Canon 6 condemns as unprofessional the representation of conflicting interests except by ex-

press consent of all concerned after a full disclosure of the facts. If the duties of the City Attorney or of his assistants include the prosecution in any Court of offenders against criminal statutes or municipal ordinances, which is the case in some States, this duty would make it improper for any of them to defend any person accused of crime, during their tenure of an office which makes any of them a prosecutor. This would extend to the defense of all criminal cases whether within the scope of his prosecution duties or not. The consent clause in the Canon could not operate in the case of a public officer.

If the City Attorney's duties and those of his assistants are entirely of a civil character as advisers to the municipality, including the conduct of civil litigation to which the city is a party, and if he is not required to defend the accused in any court in which a city official performs the duties of judge or magistrate, we find no objection to his conducting the defense of criminal cases.

### Opinion 35

**Law Practice**—A lawyer renders professional service when he tries an action in a court in which laymen are by statute prohibited from conducting trials.

**Law Practice**—Institution of suits on behalf of others is "practicing law," irrespective of whether or not laymen are by statute prohibited from rendering that service.

**Commercial Collections**—The institution and trial of a suit in a court is not the handling of a commercial collection, even though the subject matter be the same as that of an attempted collection.

**Lay Intermediaries**—A lawyer cannot properly allow his services to be exploited by a collection concern, credit exchange or any similar lay agents.

A corporation was organized under the name of a so-called "Credit Exchange," for the purpose of furnishing its stockholders or "members" with credit information and collection service. It secures its business from its members and solicits business houses, professional men and others, who have accounts to be collected, to become stockholders or "members." It does a very large collection business and, when ordinary methods of collection fail, secures permission from the creditor to start suit. The suit is started in a Municipal Court of inferior jurisdiction by employees who are not lawyers, who file the necessary pleadings, and where there is no appearance, take default judgments.

This Credit Exchange retains a firm of attorneys, who furnish it general advice, attend to its corporate matters, draft forms for it, and attend to the general legal work that comes up in connection with the operation and conduct of its business.

If there is an appearance in the cases in which the Credit Exchange has sued, the matter is set for trial and the firm of attorneys is engaged to handle the contested case and secure judgment. These attorneys bill the exchange for their services in each case, the amount of which bill is added to the charge made to the client by the Exchange.

The question is presented as to whether the attorneys may properly accept employment to try these contested cases, or whether their employment by such a lay intermediary, who solicits business for itself (and, indirectly, for these lawyers) is prohibited by Canon 35. It is argued that the lawyers

are not assisting the Credit Exchange to practice law, because it is contended that the work done by the credit exchanges and its lay employees, in preparing the pleadings, filing suit, etc., in the Municipal Court, is not practicing law. In support of this position it refers to an opinion of the Attorney General of the State, who holds that one may practice in the Municipal Court in question without being a duly licensed attorney, though that opinion admits that the question has not been directly passed upon by the Supreme Court of the State.

The Committee's opinion was stated by Mr. GALLERT, Messrs. Howe, Hinkley, Evans, Harris and Strother concurring.

A lawyer is rendering professional services, when he tries an action in a court of law, irrespective of whether or not the statutory law governing that particular court prohibits anyone, other than lawyers and litigants, from conducting such trials.

The conduct described in the question states a clear case of the professional services of a lawyer being controlled and exploited by a law agency and such conduct is contrary to Canon 35. The express exemption from condemnation in Canon 35 of "The established custom of receiving commercial collections through a lay agency" has no application since an actual trial in a "court of law" is not a "commercial collection," even though the subject matter of such trial may be the same as that of an attempted commercial collection.

In addition the Committee is of the opinion that the institution of suits on behalf of others in any court of law is "practicing law," irrespective of whether the statutory law governing that particular court prohibits the institution of such suits by persons other than lawyers or not. Lawyers should not aid or participate in any way in the practice of law by laymen or lay agencies, nor should they in any way sanction the same or profit therefrom. The conduct described in the question is improper, for the attorneys by their actions are fostering the practice of law by a lay agency, as well as aiding therein and profiting therefrom.

On the facts submitted the lawyers are also indirectly obtaining business through solicitation and, unless warranted by personal relations, which this is not, all solicitation whether direct or indirect is prohibited by Canon 27.

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# THE RISE AND FALL OF CONSTITUTIONAL DOCTRINE

Constitutional Doctrine or Theory Is a Legal Device to Keep the Fundamental Provisions and Inhibitions of the Written Constitution Modern and Responsive to Environmental Changes—Rise, Restatement and Erosion of Doctrine—Creative Evolution and New Legal Species

By E. F. ALBERTSWORTH

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LIKE the Twelve Tables of Ancient Rome, the Federal Constitution has become incrustated with a body of legal doctrine or constitutional theory in almost 300 volumes of decisions of the Federal Supreme Court, not to mention the great number of volumes of inferior federal tribunals. These are the product of national historical development and constitutional construction by numerous and variously gifted legal minds because of the ever changing personnel of the judiciary. That from this jungle of case law there should have resulted a marvelously consistent body of constitutional doctrine—the product of hundreds of judges for almost 150 years of history—free from fallacious reasoning, wrong emphases, and misapplication of the Constitution, is too much to expect of any human endeavor, not even of jurists of the high calibre of the incumbents of the Federal Supreme Court. Weighty evidence of this is to be seen in the numerous dissents in the court's opinions. A group of pioneer justices, in a given age, formulate certain constitutional doctrines to bridge the hiatus between the written Constitution and the factual situation in the issues before the court, because the constitutional provisions applicable are not self-executing and mean what the judges interpret them to mean;<sup>1</sup> a later group of justices, in a subsequent age, perhaps, but maybe in the same era, building on the premises laid, "modify," "differentiate," or even—but rarely expressly—"overrule."<sup>2</sup> Stated otherwise, the written Constitution is mediated by a judicial personnel who approach the constitutional issues that come before them from various schools of juristic thought, or perhaps from socially stereotyped viewpoints, both of which influence constitutional construction. Constitutional scholasticism will construe the controls of the written Constitution with different results from that of constitutional realism;<sup>3</sup> the individualist obtains

from constitutional restrictions or inhibitions a meaning decidedly different from that of the sociological theorist; the federalist sees justification in the Constitution for powers over the constituent States that the ardent, but fast dying-out exponent of States' rights, refuses to or cannot see.<sup>4</sup> Thus, because of the incrustation of constitutional doctrine, the real or actual Constitution is different from the written or formal Constitution; constitutional doctrine may be different from the really original document; constitutional doctrine ebbs and flows, rises and falls, but the original Constitution remains. If this were not so, the written Constitution would long since have ceased to operate, and would have in some of its provisions become obsolete;<sup>5</sup> the doctrinal creations that result from judicial construction keep it alive, keep it functioning from one age to another. Constitutional doctrine or theory is thus a legal device to keep the fundamental provisions and inhibitions of the written Constitution modern and responsive to environmental changes.

## The Rise of Constitutional Doctrine

Constitutional doctrine, like legal doctrine generally, is but one phase of human reasoning, and its thought processes must be of the same general nature as human reason. Now in reasoning in general there are observable two fundamental tendencies: 1. To reduce all explanations or events to a single principle, to a monism, by means of which appearances, happenings, conflicts in experience, and various problems are explained in a manner satisfactory to ourselves; 2. To generalize from particular experiences or particular events to the general rule, from the concrete to the universal, from the haphazard to the permanent. Both of these tendencies are inveterate mental processes; whether they are inevitable, or whether they agree with reality, is not now the question. But we attempt to adjust ourselves to new situations by the mental picture that we have created; and, as our experience enlarges, as our knowledge advances, the old monistic principle, the old generalization, may be found inadequate to make the mental adjustments. Hence, we re-formulate or re-state the

1. This truth is well illustrated by the gradual formulation of the doctrine that the Federal power over interstate commerce is not exclusive except in so-called "national" matters. See the history of these developments beginning in *The License Cases* (1847) 5 How. 504, and *Cooley v. Board of Wardens* (1851) 19 How. 209, and ending temporarily in *Leisy v. Hardin* (1890) 135 U. S. 100. The doctrine of a "direct and substantial" restraint on interstate commerce by State regulations is slowly evolved from the latter case. Cf. "What is a Direct Restraint of Trade," 22 Illinois Law Review, 197.

2. "The doctrine of *stare decisis* does not command that we err again when we have occasion to pass upon a different statute. In the search for truth through the slow process of inclusion and exclusion, involving trial and error, it behooves us to reject, as guides, the decisions upon such questions which prove to have been mistaken. . . . The many cases on the commerce clause in which this court has overruled or explained away its earlier decisions show that the wisdom of this course has been heretofore recognized." Brandeis, J., dissenting, in *Di Santo v. Commonwealth of Pennsylvania* (1937) 273 U. S. 34, 35.

3. Felix Frankfurter, "Hours of Labor and Realism in Constitutional Law," 29 Harvard Law Review, 208.

4. *Penn. v. West Va.* (1923) 208 U. S. 583; *Railroad Comm. of Wis. v. Chicago, B. & Q. Ry. Co.* (1923) 257 U. S. 563; Note, "The Waning Power of the States Over Railroads," 37 Harvard Law Review, 858.

5. "The Federal Supreme Court and the Superstructure of the Constitution," 18 American Bar Association Journal, 565.

6. Reference is had to construction by the Supreme Court of the controls of "due process" and "equal protection" of law particularly as they were construed in workmen's compensation legislation. Cf. *New York Central Ry. v. White* (1917) 248 U. S. 199.

older viewpoints to make them inclusive of the new elements in our environment; or we reject them as untenable, as no longer pragmatically workable to explain reality and experience. Being man-made, our formulations are not absolute or unchangeable; they are variable and thus adjustable. Hence, doctrine is a device for articulation of problems in the circle of our personal experience, enabling us to explain reality or environment and to adjust ourselves to it.

The judiciary must meet this urge for singleness of principle, this quest for universality of rule, in the conflict between statute and constitutional prohibition. For this generalized principle serves the useful function of enabling persons, to some extent, to predict the outcome of future judicial decision in its application to rights and duties of persons and governmental agencies subject to constitutional restraints. Furthermore, by formulating a doctrine on the issues involved, rather than merely settling the controversy itself without invocation of doctrinal generalization, it appears as though external rules, and not subjective considerations or practical solutions, govern judicial decision, and thus the judges "find" rather than "make" the doctrine. To illustrate: The Federal Constitution prohibits in general phraseology the taxing of imports by the constituent States. Without further constitutional guidance, judicial construction reaches the result that this means "foreign" imports, or those from foreign countries, and not from sister States of the Union.<sup>7</sup> But when will we have an "import," in what form will it be? Again, without constitutional aid expressly, the result reached by construction is the "original package" doctrine. Doctrine now begins to be formulated on the matter, viz.: A component State may not tax imports from foreign countries in their "original package" form. Why is the "original package" device seized upon? Because administratively and practically it enables persons contesting these taxes, as well as the taxing States, at once to know their rights and duties, and because by striking down a taxing statute by the importing State in this form, it indirectly prevents the importing State from taxing consumers in other constituent States, for the original package is not yet commingled with the mass of personal property in the importing State. But the written Constitution makes no such solution of this problem expressly; it is solely judicial in its origin and formulation. Hence, a monistic and generalized principle has been created: Original package goods from foreign countries may not be taxed by importing States of the Union; nothing decided with reference to when an "original package" is really original, or in what form it must be to be original; nothing decided as to whether or not importing States may, under police powers, regulate the sale of such packages, if not impose a tax. Temporarily, then, the doctrine as formulated rests here, until new situations arise calling for re-examination of the principle created by the judicial pioneers in the case of first impression.

Similar development and analysis is observable in other judicially created constitutional doctrines, in cases of first impression, or arising *de novo*.

7. *Brown v. Maryland* (1897) 19 Wheat. 419, opinion by Marshall, C. J. The dictum by the Chief Justice, that the same rule would apply also to taxes on products coming from sister States, gave the justices considerable trouble later, but it was not followed, as seen in *Woodruff v. Parham* (1869) 8 Wall. 123.

For example, there is no restriction in express terms on the component States to make just compensation for property taken for public use, but there is such restriction expressly on the Federal Government. However, the States are prohibited from depriving any person of life, liberty, and property "without due process." By construction, then, it is held, and of course properly so, that "due process" of law is inclusive of all those situations where the State takes private property for public use without just compensation.<sup>8</sup> There are as yet no refinements laid down as to when property is not really taken for public use, but only prohibited under police regulations, or, if claimed to be taken for public use, whether the use is actually public according to judicial standards. These are all later developments.

The development of the exact nature of relationship between federal control over interstate commerce and police regulations by the component States shows plainly how the judicial horizon enlarges. Beginning with the correct doctrine, but solely of judicial origin, that the grant to the federal government of power over interstate and foreign commerce did not preclude State regulation, the theory next expanded and negated State regulations if Congress itself had legislated on the subject matter, indicating that Congress meant thereby to exclude State action. But this generalization is subsequently held inadequate to cover all possible problems, so the doctrine is re-stated and widened by providing that in so-called "national" subjects, Congress has exclusive power over interstate commerce even though it has not legislated—its very inaction in these fields indicates an intention to exclude all State regulations. Then the difficulty becomes one of settling what are national subjects, and here the cases adopt the process of exclusion and inclusion.

Again, in a case of first impression, the doctrine is created that a charter of a corporation is a contract with the State preventing the latter through alterations from "impairing the obligation" of contract thus created.<sup>9</sup> The extent of the possibilities that might arise from this doctrine are not clearly envisaged, as seen from the later numerous exceptions that are engrafted to it.<sup>10</sup> Lastly, but briefly, judicial decisions of highest State courts relating to general matters in jurisdictions where federal courts are sitting and are asked to apply them as rules of decision, are not "laws" within the federal conformity act, requiring subsequently many metaphysical refinements in reason;<sup>11</sup> "penal judgments" of sister States are not within the "full faith and credit clause" so as to be compulsorily recognizable by the constituent States, although the written Constitution expressly made no such distinction;<sup>12</sup> foreign corporations might be excluded by component States on whatever ground they might determine, so long as they had no federal right to enter the jurisdiction, such as being engaged in

8. *Chicago, B. & Q. Ry. Co. v. Chicago* (1897) 166 U. S. 226.

9. *Trustees of Dartmouth College v. Woodward* (1819) 4 Wheat. 513.

10. As in *Laramie Co. v. Albany Co.* (1875) 92 U. S. 307 (municipal corporations), and in *Taylor v. Beckham* (1900) 178 U. S. 543 (public office not a contract).

11. *Swift v. Tyson* (1842) 16 Peters. 1, and *Black & White Taxi & T. Co. v. Brown & Yellow Taxi & T. Co.* (1928) 276 U. S. 513, and cf. A. M. Dobie, "Seven Implications of *Swift v. Tyson*," 16 Virginia Law Review, 225.

12. *Huntington v. Attrill* (1892) 146 U. S. 657; and see Goodrich, "Conflict of Laws," p. 462.

interstate commerce.<sup>13</sup> Limitations on these judicially created doctrines—and there are many others—were not pressed in argument, and were thus not engrafted by the judicial pioneers to the first formulations. Perhaps, too, they were not relevant to the main argument.

### Re-Statement of Constitutional Doctrine

The requirement of singleness of issue in cases and controversies prevents consideration by the American judiciary of collateral questions of great importance generally if not to the litigants, which therefore precludes dogmatic generalization in doctrinal formulation in the first instance. The various "invisible radiations" of a doctrine when first formulated by the judicial pioneers cannot thus be envisaged; in fact, to enter upon such a function would be utterance of dicta, or the performance of non-judicial functions by passing upon moot questions. It would be equivalent to rendering declaratory judgments without statutory authority, or, in cases where the government is interested, the rendition of advisory opinions. Moreover, human relationships are not only continually changing, but they are interrelated in decidedly innumerable ways, and cannot, therefore, owing to singleness of issues, be presented to the judiciary at the time of original doctrinal formulation. The striking contrast in other scientific fields is here most interesting. The physicist deals with but a few known elements, and these are gradually being reduced to a *noumenon* not yet discernible; but the paucity of elements furthers doctrinal statement and accurate prediction from the prophesied combinations and relations. The mathematician can also predict with certainty the outcome of formulated laws. On the contrary, the lawyer and judge who deal with the infinite variety of and constantly changing human interrelations in a changing world, engage in generalization of legal doctrine or statement of basic principles with caution and often at their peril. In the Holmesian sense, therefore, law is largely prediction what the court in a given litigation will hold in view of decided cases. Finally, there are certain legal standards that are incapable of rigid doctrinal formulation in the first instance, for to do so would be to define and limit, and thus to make possible in future possible violations of law and embarrassment to the court which handed down the original decisions. Illustrative of this truth is the refusal of the Supreme Court to draw lines of demarcation between national and State areas under the interstate commerce power.

Thus the judicial pioneers of a doctrine in constitutional law, seeking to solve a problem of alleged conflict between statute and organic law presenting an issue in a case or controversy, must be cautious not to originate an absolute doctrine, in view of the fact that all the ultimate consequences, which may be detrimental, cannot be envisaged; human foreseeability is inadequate; possibility of mechanical application of the rule formulated must be precluded. Here enters the necessity of restatement of the original doctrinal

formulation, whether made absolutely or qualifiedly at first. The old doctrine is still repeated, but there is engrafted to it a qualification, a restriction, an explanation of some character. Thus, to complete the picture of the "original package" illustration already given, the holding later is that the doctrine of allowing a constituent State to tax original package goods from sister States, does not apply where the importing State prohibits the sale of the original package because of an announced public welfare within the State, as where the importing State, prior to the Eighteenth Amendment, sought to prevent the introduction of liquor because of a State dry policy.<sup>14</sup> Although the State might tax the original package in the State, in common with other personal property, this would be ineffectual as liquor had been outlawed, and thus such a tax would be a discrimination against imports. Hence, the reasoning is that to prohibit the sale of the original package after once introduced indirectly affects the interstate transport of the liquor because it could not be with safety sent to the importing State confines. But this doctrine in turn will not be applied to import of cigarettes even though sealed and in their original package when delivered to the consignee in the importing State; original package means such size as would be used by wholesalers and dealers in the commodity or article of trade, not in the size which the consumer himself will receive.<sup>15</sup> Dismissing from consideration other factors over a period of three-quarters of a century which might have influenced re-consideration of the "original package" doctrine, and assuming only logical development of the doctrine, the essential point is that the older doctrine is still theoretically upheld within the confines of those premises where it was first formulated, but qualified in other directions where it is believed that superior claims press for justification. But qualification of the doctrine has begun, and this is all important.<sup>16</sup> In other instances, there may be a widening of the doctrine, with perhaps later qualification or retraction, as new situations present themselves which would not be first presented owing to the requirement of singleness of issues.

### The Erosion of Doctrine

From qualification or restriction to slow but gradual repudiation is only a question of degree, as Mr. Justice Holmes says is true of all distinctions, but it is vital. A court may expressly repudiate its own prior formulated doctrine, but this will be a rarity where the identical personnel both created and repudiated the doctrine. It will be more easily done where a later personnel of the same court re-examine the work of the predecessors, and under American theory of *stare decisis*, such practice should not be generally followed.<sup>17</sup> Reference is not now had to the practice of occasional absolute repudiation, but on the contrary to that of gradually weakening, by numerous quali-

14. *Leisy v. Hardin*, *supra*, Note 1.

15. *Austin v. Tennessee* (1900) 179 U. S. 343.

16. See the impressive list of decisions given by Mr. Justice Brandeis in *Di Santo v. Commonwealth of Pennsylvania*, *supra*, Note 2, "overruling" or "qualifying" earlier doctrines, especially as to what is a "direct" restraint of interstate commerce on the part of State regulations.

17. As for example, in *Terral v. Burke Construction Co.* (1922) 237 U. S. 559, Taft, C. J., saying the earlier cases could not be reconciled, and that the minority opinions had now become the law. The earlier doctrines began with *Home Ins. Co. v. Morse*, 20 Wall. 455, and *Doyle v. Continental Ins. Co.*, 94 U. S. 535.

18. Under the original doctrine of *Paul v. Virginia* (1869) 8 Wall. 168, reaffirmed in *N. Y. Life Ins. Co. v. Deer Lodge County* (1912) 231 U. S. 495. But cf. *Kentucky Finance Corp. v. Paramount Auto Exchange Corp.* (1922) 263 U. S. 544 (doctrine of absolute exclusion of foreign corporation, not engaged in interstate commerce, weakening, Brandeis and Holmes, JJ., pointing this out in dissent).

fications and exceptions, a conceded doctrinal development so that paradoxically speaking, there is left of it only an empty shell. Dissenting opinions attacking the older formulation which may in their view be mechanically repeated by the majority, swell the torrent of the erosive process, further weakening and gradually undermining the conceptual inheritance, like the scriptural illustration of the house built upon sand. While expressly disavowing repudiation of the formulated doctrine, a court at the same time may employ certain devices by which the process of erosion is furthered. Some of them are: 1. Counsel did not in the earlier case which created the doctrine call to the attention of the court certain facts which are now available, or brought to its attention; 2. The rule as laid down in the earlier case and the language there used must be taken only in connection with the facts and issues there presented, and, if stated too broadly, was, at the most, dictum, and cannot be extended to the new situation here presented; 3. The doctrine earlier enunciated can have no application to the facts now before the court, for these facts are radically different and do not come within the accepted rule; 4. Argument to the contrary is not convincing, for "the mere statement of the proposition carries its own condemnation with it." These, and possibly other, trump cards the judiciary will always possess in the game of litigation, by means of which the judiciary holds the balance of power. Hence, prediction of decision is uncertain; but can these methods be condemned in view of the complexity of human relationships and the delicate balance of the scales of justice? Must there not be flexibility and concreteness in judicial treatment of issues, and especially so where attacks are made on statutes as in conflict with organic law, where numerous and paramount interests are at stake which were not clearly in the judicial consciousness when the pioneers were engaged in doctrinal formulation? Must the judges not be somewhat of legislators in the interstices as the latter present themselves in the juridical network of complex human relationships?

#### Creative Evolution and New Legal Species

That there have thus far been no new species in an organic sense, and that what appear to be such revert to type under the inexorable laws of Mendel, remains the insuperable objection to the theory of organic evolution as at present formulated. But in legal doctrinal formulation, out of the fertilization of qualifications of doctrines, and the application to new situations of facts, with emphases of new-age requirements, there may result through the process a new legal species. A certain formulation is tested in the crucible of experiment and found to be wanting; it is qualified, eroded, and finally expressly repudiated, and like the phoenix bird, a re-birth is at the same time the result.

Striking development resulting in a new constitutional doctrinal creation is to be seen arising from the vagaries of treatment that foreign corporations, with their claim to do business in the admitted State, have undergone in their asserted right to remove cases to the federal courts.<sup>19</sup> For

dealing with this problem the early doctrine, created by the Federal Supreme Court, was to uphold the claim of the State against the foreign corporation on a theory of waiver of its right to withdraw its cases to the federal courts by its entering the jurisdiction of the State to do business; later, this doctrine being found not inclusive enough to deal with situations where the State prohibited such removals to the federal courts after the foreign corporation had entered the State, another theory was advanced, namely, withdrawing its right to do business if it did so withdraw its cases for hearing by federal courts. In the formulation of these distinctions and qualifications, numerous dissents occurred which aided in the erosive process. Finally, a new personnel having gradually obtained control of the court, the old doctrine of absolute right of the State to prevent removals of cases against foreign corporations to federal courts, is repudiated entirely, and the doctrine created out of the old, that the right to take one's cases is superior to the claim of the State to lay down conditions of doing business in the confines of the State. Thus a new legal species is created. Similar developments are traceable in other decisions. The question how far the vendor of a patented machine may require of the buyer that he deal restrictively with the vendor for articles used by the machine has had an interesting development;<sup>20</sup> so has the question what is a direct, as opposed to an indirect, restraint of interstate commerce by State regulations;<sup>21</sup> how far the States may bargain away in a contract their taxing powers;<sup>22</sup> how far, through reserved power of eminent domain and police, the States may impair the obligation of contract;<sup>23</sup> how far restraint of trade statutes of the Federal Government became gradually, but surely, transmuted into judicial creations different from the letter of the law;<sup>24</sup> how far States' rights doctrines dissolved before an omnipresent federalism;<sup>25</sup> to what extent the treaty power gradually dominates State claims, and cures defects in federal statutes enacted without power;<sup>26</sup> and numerous other variations. Throughout these developments one is confronted with a panorama of moving, scintillating thought, passing on to new conceptions, from single and universal propositions, to qualifications, extensions, repudiations, and re-creations. In theory, there is a body of predictable and standard doctrine explanatory of the written Constitution; in fact, there are only individual applications, in a vast number of factual situations, which may or may not be followed by the same court in later cases where new angles are presented. Stated philosophically, we have instead

19. *Motion Picture Co. v. Universal Film Co.* (1917) 248 U. S. 508, overruling the *Dick Case*, 234 U. S. 1.

20. "Various Theories Over Interstate Commerce," 33 *Illinois Law Review*, 304.

21. *Piqua Branch of State Bank of Ohio v. Knapp* (1858) 16 How. 360. The strong dissent in *Washington University v. Rees* (1889) 8 Wall. 429, questioning the power of one legislature to bind a subsequent one in tax exemptions influenced later opinions in modifying the absoluteness of the original doctrine. Cf. *Rochester Ry. Co. v. Rochester* (1907) 205 U. S. 236 (no assignability of an exemption contract; the privilege is personal).

22. *Covington v. Kentucky* (1890) 173 N. S. 321; *Greenwood v. Freight Co.* (1882) 105 U. S. 13; *Sinking Fund Cases*, 90 U. S. 700.

23. Davis, "Life of Edward Douglass White," 7 *Amer. Bar Ass'n Journal*, 377.

24. James M. Beck, "The Vanishing Rights of the States," ch. 1, "The Erosion of the Constitution."

25. *Missouri v. Holland* (1920) 253 U. S. 416; F. R. Black, "Missouri v. Holland—A Judicial Milepost on the Road to Absolutism," 25 *Ill. Law Rev.* 911.

18. As seen in *Terral v. Burke Construction Co.*, *supra*, Note 17; and see Charles Warren, "Federal and State Court Interference," 48 *Harvard Law Review*, 345.

of monism and absolutism, pluralism and relativism.

### The Value of Doctrine

If doctrine thus is created, qualified, eroded, repudiated, and then re-created, as new situations present themselves and as knowledge enlarges, of what value is it in constitutional interpretation and construction? Its large value is that it forms the liaison between the letter of the written Constitution and the issues of the case or controversy demanding solution of the conflict between statute and organic law; this judicial mediation is the necessary link between the formulation of the past, as embodied in the Constitution, and the requirements of the present, as exemplified in the statutory enactment. The immediate need is that of the litigants, the ultimate one that of the public in general, who, from the decision, may forecast rights and duties. Moreover, doctrinal theory tends to

become externalized, controlling judicial decision in future cases of similar factual situation, thus preventing arbitrary analyses and judgments. Just how far doctrine controls the conclusion reached by the courts is conjectural; some would deny that control entirely, placing other factors as controlling decision. But the fact that the judge is part of the environmental thought of the age would seem to make most strongly for his control, to some extent, by it, without perhaps his conscious knowledge. The individual mind consists partly of the social mind in which he is enmeshed.<sup>26</sup> Hence, the judge is not entirely a "free juristic person" in reaching as well as formulating his judgments. Here is where doctrine enters. Nonetheless, doctrine rises and falls through judicial creation because external environmental requirements are mutable, and because law itself is a device for meeting these needs.

26. Cardozo, "The Nature of the Judicial Process," ch. 3.

## THE THREATENED INUNDATION OF THE BAR

Time Has Come to Make a Direct Effort to Solve the Problem—Improving the Course of Study and Bar Overcrowding Are Two Distinct Matters—Limited Function of Bar Examining Boards—Function of the Law Schools—Suggested Program

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IT IS apparent to even the most casual observer that the legal profession in the United States is becoming aware of what might be called the problem of a threatened inundation of the bar. It is submitted that if there is such a problem—and there certainly appears to be ample evidence of the fact that there is—the time has come to make a direct effort toward its solution.

For the purpose of the present discussion, such devices as holding out ratings to law schools, in order to induce them to raise admission requirements; the failing of high percentages of the applicants for admission to the bar, and the insistence that the local boards of bar examiners shall be even more strict, are called indirect methods of handling the problem.

### Improving the Course of Study and Bar Overcrowding as Two Distinct Matters

Since 1920 the American bar has been making an effort to improve the course of study, largely through lengthening the course, but of course by means of other devices, such as withholding the ratings given by the American Bar Association to schools which comply with other requirements as to admission, faculty, library, etc. As a means of improving legal education in the United States, the effort has had notable success. After ten years of controversy within the ranks of the American Bar

Association itself, the last two years have witnessed a final and unquestioned upholding of its policy, dating from 1920, that it should approve only law schools requiring a two-year pre-legal course, followed by a full three-year law course, given in a law school with an adequate faculty, library and other facilities.

The Association of American Law Schools has likewise adopted a very similar policy, and by refusing membership to schools which did not supply facilities, and conform to policies approved by the Association of American Law Schools, has had notable success in contributing to the cause of improved legal education in this country.

We are not concerned here with the validity of the policy adopted by both of the associations just mentioned. That the policy has contributed greatly to the improvement of legal education cannot be questioned. The situation has changed in the last ten years from one where pre-legal requirements were the exception rather than the rule, and where the course of legal study might be anything from six months or a year upward, to a situation where approximately forty per cent of the law schools in the country are complying fully with the requirement of a five-year course, and where a number of schools are requiring a six- or seven-year course, and where many schools not approved by the Bar Association and not admitted to membership in the School Association, are substantially complying

with the five-year course requirement, and may be expected to comply fully with all requirements of both associations in the near future.

But while the adoption and enforcement of the policies of these associations has had a notable success as a means of improving legal education, the requirement as to a lengthened course of study has not tended in the least to solve the problem of an overcrowded bar.

As a matter of fact, it is doubtful if the policy as to improvement in legal education was ever designed to solve the problem of an overcrowded bar. There seems to be no reason why the American legal profession cannot take full credit for an honest motive in the matter of raising law school standards, without incurring the suspicion of a hidden motive to limit the number of attorneys admitted to the bar. As a matter of fact, the lengthening of the minimum approved course to five years can be and is defended on its own merits. There are not lacking those who contend that a six-year or seven-year course should be the minimum. Further, it can be pointed out that in 1920, when the first significant action was taken on the matter of a longer law course, the present problem as to overcrowding had not arisen.

In any case, however, law school enrollments have increased by leaps and bounds in the last ten years. While the true explanation doubtless lies elsewhere, it would almost seem that raising admission requirements only served to increase the numbers of students who wished to get into the schools. Notwithstanding some slight decrease in law school enrollments in the last two years, enrollments have increased enormously since 1920, and the increase has been out of all proportion to the needs that might be expected as a result of increased population. Nor is there anything in the figures of the last two years to indicate that enrollments will not continue to increase.

#### The American Bar in 1940

Since it is proposed to treat the problem of overcrowding as one separate and distinct from the problem of improving legal education, it might be well to pause a moment to consider some figures which may tend to indicate what the problem of the next ten years is likely to be.

The actual figures at the present time are substantially as follows: There are now in the United States approximately 150,000 lawyers and 50,000 law students. By making a short and simple arithmetical calculation one can arrive very quickly at an astonishing prospect. In three years the profession will be increased by approximately fifty thousand new lawyers. There will of course be some failures in the law schools. On the other hand increases in enrollment may offset those losses. At the end of another six years it seems possible that there will be another addition of fifty thousand new lawyers. At the end of ten years it does not seem improbable that there may be a total increase equal to the number of lawyers now in practice.

Of course, some replacements will be necessary due to death, retirement, etc. If roughly it is estimated that the average lawyer practices for twenty-five years, the necessary replacements—if we consider the present situation ideal—should approximate four per cent a year of the present number of

150,000. On this basis about 60,000 new lawyers could find places in the next ten years. Increased population, if estimated to be the same for the next as for the last ten years, might also supply places for another 15,000, so that 75,000 at the most would be needed. We are, however, if the present system continues, likely to have approximately twice that number.

It will hardly be contended that such a prospect is not thought-provoking to those who are interested in the future of the profession. Even if we admit that increased wealth as well as increased population is to be considered, and even if we admit that many law school graduates do not enter into active practice, still the prospect affords food for thought.

The ordinary economic processes which permit the survival of the fittest and the elimination of the unfit, appear to be too wasteful to the individuals eliminated, and too harmful to the public in general to be relied on as the only means of solution, if it is possible to find better ones. The waste involved when a student is allowed to invest years of his life and several thousands of dollars in acquiring a legal education, only to be denied an opportunity to practice his profession in the end, is apparent to all. But if this were all, we might be content to let him take his chance, as in other fields of competition. There are many, however, who have a lively feeling that the matter of professional service is to be distinguished from the ordinary competitive commercial fields because of the grave danger of injury to the public in general from the lowering of professional standards which are likely to attend too keen competition. The client of the lawyer, unlike the customer of the merchant, is too likely to be the victim, rather than the beneficiary of the fiduciary relationship which exists between lawyer and client, if the struggle for survival in the profession becomes too keen.

To those who take this point of view, then, the question immediately presents itself, "What is to be done, and how?"

#### Limited Function of the Bar Examining Boards

One of the "indirect" solutions which has been attempted is to put pressure on the boards of bar examiners to reduce the numbers of those admitted to practice. Another manifestation has been the tendency to blame the examiners for allowing so many to secure their licenses. At first glance, this indirect attempt to solve the question might seem to be effectual. The number of applicants failed by the various state boards has increased at an astonishing rate. Arizona, for example, in 1929 failed 86% of the applicants. In 1930, Kentucky failed 70%. These figures represent extremes, but the normal situation is not so far from these as might be expected. Figures for 1930 show that for 35 jurisdictions, 14 states failed 50% or more of their applicants. Twenty-two states failed 35% or more. The average for the country is close to 40%. (These figures are taken from *The Law Student*, May and October, 1930 numbers.) Under these circumstances, we might well suppose that the boards of examiners are doing all they can, and even in some cases, more than they should.

But if the New York experience is anything to go by, the heavy-failure system will not solve the problem. In spite of a high percentage of failures

in that state over a period of years—62% were failed in June, 1930—applicants for examination appear in undiminished numbers. According to a study made by Mr. Philip J. Wickser of the New Board of Law Examiners, the Board feels that it can say that only 5% of the applicants are kept out by the "high-percentage-of-failure" method. And if Mr. Wickser is correctly understood, his position is that with this experience to inform us, the bar should not insist that the examining boards assume full responsibility for the numbers admitted to the bar.

Now why should it be impossible to keep out more than 5% of the applicants for admission, when normally 50% are failed? When we inquire into this matter we are convinced that it is about as it should be, and that it should not furnish ground for complaint against the examiners. Let us consider that the examinations are designed to test the ability of a student who has completed a three-year course of instruction, and that the student has invested at least five years, and some thousands of dollars in securing that instruction. When he comes to take his first examination, and fails, he has too much of an investment in his legal education to give up the idea of practicing law. His only alternative is to secure additional preparation. Six months later, with three and a half years of preparation, he should be able to pass a three-year examination. With additional preparation totalling four years, or four and a half or five years, if he is any good at all he should be able to compete with three-year students and get through. Especially is this so when his school studies are supplemented by a clerkship in an office. In fact, we come to wonder how the ultimate 5% are kept out.

Nevertheless, we face this proposition: That all the bar examining activity is for the 5% or so who are ultimately kept out of the ranks of the profession. Is the game worth the candle? Why not give the schools the diploma privilege and save all the trouble and time spent by the examining boards. The point is, of course, that it is the product of the schools that the boards are working with. It is the graduates of those very schools that the examiners fail so numerously, in many instances. If the slight control which the boards of examiners exercise were withdrawn, the freedom left thereby to the schools might be abused so that the present situation might be still more aggravated. Notwithstanding the fact that the diploma privilege has been granted in some dozen or more states, it seems good policy to control the schools by having a board of examiners. It is submitted, however, that the primary function of the examining boards should be to check on the schools, but not to limit admissions to the bar. If schools cease to be in fact law schools, it is well to have an independent board to call attention to that fact, but if the schools give an adequate course, supply adequate facilities and turn out an adequate product, it seems that that is all the boards of examiners can guarantee. Our experience shows that they cannot in addition solve the problem of limiting admission to the bar.

#### The Function of the Law Schools

While the examining boards cannot, the law schools should not, be expected to serve as agencies for limiting admission to the bar.

The law school, and particularly in the case of the university law school which dominates American legal education today, is primarily an educational institution. Its mission is to educate and to invite the youth of the country to take the advantages offered. Consistent with its mission, the university or tax-supported law school should not attempt to limit enrollment, or discourage young people from availing themselves of the opportunities offered in the school. On the contrary, it should render the service it is designed to render, to as many people of the state as possible, provided only that students obey the rules and do a satisfactory quality of work. It is totally foreign to the function of such a school to serve as a bar limiting agency. It serves its purpose only when it educates as many people as possible and so contributes, as it should contribute, to the general cultural level of the state.

This position is maintained, and is the only one that can justifiably be maintained, even in face of the fact that the law school is a so-called "professional school." For underlying its function of giving professional education is its function of giving educational advantages in a broader sense. While it is conventional to refer to the law schools as professional schools, does anyone doubt that if the true function of education is to acquaint students with the world they live in and the people they live with, the law school course is as well adapted as any other to serve this function? Even the liberal arts colleges insist that the student should begin to specialize at the beginning of his third year in order to comply with requirements as to major and minor fields of study. The law school does the same thing, and while it offers only one field of major study, that field comprehends the whole field of government, economic activity, social relations, and in short practically the whole field of human activity as a necessary incident to the acquisition of the professional point of view, the professional learning, and the professional techniques. If a student, or if his parents, for him, prefer that he secure the "liberal" education available in a law school to the "liberal education in philosophy or history, etc., obtainable in the arts colleges, it is not the function of the university or of the law school to deny him this opportunity, even if at the close of his studies he may decide to seek admission to the bar. And certainly he should not be denied the opportunity in case he does not wish to practice law.

There is further no reason for denying admission to the student interested in governmental administration who wants a legal education. There is no reason for denying admission to the commerce student, who wishes to have a knowledge of law to use with his business. And so it goes in the case of those primarily interested in economics, sociology, and other fields. The law school should invite them all, and discourage none of them.

If we wish therefore to put a proposition as to the function, even of the professional law school, we should keep clearly in mind that it is as follows: The primary function of the professional law school is to teach law. That is a very different thing from saying that it should teach law to as few students as

possible. It is also a very different thing from saying that it should *limit admissions to the bar*.

Again with our system of state, as distinguished from national, control of admission to the bar, there are problems of a competitive character that the local law schools are not able to deal with, even if they could or should. Suppose a local law school should adopt excessively high requirements for admission and graduation in the misguided view that the responsibility for an overcrowded bar rests on it. The result is to drive many of its own students away from their own state university law school to nearby competing schools. This has the disadvantage of depriving the student of the advantages which his local school is designed to serve, of forcing the student to acquire his education in an environment where he will necessarily miss contacts and acquaintance with local state problems, and all to no valuable purpose whatever. For the student after finishing his law course at some out-of-state institutions comes back with only the normal preparation, takes the bar examination, gets through, circumvents the policy of the local school, and enters into the practice of law. The only comfort, if it be a comfort, to the local school is that it has tried *without success* to keep that student from securing admission to the bar, that it has tried *without success* to perform someone else's task of limiting admissions to the bar, and perhaps a holier-than-thou feeling that its standards are above those of its neighbors.

But the main point to be kept in mind is that the function of even the professional school is to educate. It should of course have proper requirements as to admission and graduation. It is none of its affair, however, how many students are admitted to the bar. And as just indicated, the imposition of unduly high requirements simply frustrates the function of the school and contributes nothing to the solution of bar overcrowding.

#### Dissuasion From Undertaking a Law Course

Under our present method of procedure, therefore, the schools in carrying out their function invite all and sundry to take advantage of the educational opportunities available. That the invitation is a dignified one does not alter the case. On the other hand, the boards of examiners are doing all they can to discourage those who have finished their courses from entering the practice of law. That we call it eliminating the unfit does not alter the case. Facts are facts and euphony is eliminating the unfit, but they both mean the same thing when bar examination failures normally reach 50 per cent or more in many states. But in any case the schools seem to be having the advantage. Swarms of students apply for admission to the bar, and an ultimate five per cent or so are kept out (if the New York figures are at all typical). And this situation seems to be inevitable under the present method of "bushwhacking" graduates as they venture near the professional circle at the close of their law school studies, through the failure of forty or fifty, or even sixty per cent or more of them on the bar examinations. This method, as we know, is ineffectual.

What is needed, therefore, is a direct frontal attack on the whole problem. This attack involves some method of dissuading students from taking

advantage of the educational opportunities in the schools, in the beginning, rather than a rear guard method of sniping at the forces of the graduates as they wear down the examiners in their endeavor to secure professional standing, after they have invested too much in their legal education to consider any other means of livelihood. If further military metaphor is permissible, what is needed is something that will prevent them from getting into a position where they have burned their bridges behind them, or nailed their flag to the mast, so that the only thing left to do is to fight for admission.

This attack involves a direct approach to the matter of raising local *state bar admission requirements*—not *school admission requirements*—to the point where the examiners will be relieved of the useless burden of trying to disable five per cent of the "enemy," and where the schools will be relieved of the impossible position of being required to educate, and at the same time to deny education to those who come to them for it. The plan involves nothing less than a deliberate program to induce legislative or other authorities to raise local requirements to a point where the surplus of law students will be discouraged in the beginning from attempting to surmount the barriers.

There is a fundamental question of justice, and of serious economic and social waste, in allowing the student, as at present, to invest years of time and effort, and hundreds and even thousands of dollars in securing an education, and in leaving the barriers to professional standing low enough to tempt him to try to surmount them, and then when he makes the trial turn him back on the euphonious plea that he is unfit. This is in the case of those who are ultimately denied admission. As already noticed, the majority refuse to be turned back and take their places among us. Neither solution appears to be satisfactory.

If, however, the local authorities can be prevailed upon, and they must be prevailed upon if an adequate solution is to be reached,—the standards for that state can be fixed at a sufficiently high level to accomplish several desirable objects. Those without serious purpose will be discouraged at the start from undertaking a law course. The schools will be relieved from the embarrassing position of being expected at the same time to limit admissions to the bar and educate as many as possible. The bar examiners will be relieved of the present ineffectual effort to limit admission to those apparently most fit. There will be no embarrassment to a school which wishes to adopt proper professional standards of education, in seeing its own students driven to schools with lower standards, from which they can return and secure admission to the bar. There will be no dependence upon *voluntary action by the schools* or upon the ineffectual efforts of the examiners who are working on a proposition they are *not given the power to handle*.

In short, to use a concrete illustration, suppose the legislature required four years of pre-legal study, followed by three years of law study. The schools of course would have to meet this requirement. In meeting it they would not be violating their duty to educate. It would rest with the student whether or not he wished to meet the require-

ments for admission to the bar. The examiners would have many less papers to grade. In fact they could probably depend entirely on the seriousness of the student who would undertake such a long course of study, as the best guarantee of his fitness to practice law, provided the school attended required an adequate standard of work.

As a final consequence, the boards of examiners might be relieved entirely of their futile efforts to stem the tide, and be made a body whose sole, but whose most useful function in the last analysis, as it is in fact at the present time, is to check on the schools to see that they are doing an adequate piece of work in the legal instruction they give. The assumption would be that after periodical investigation, the course, if approved, is adequate, and graduates should be admitted to the bar without further examination. If a school is not approved, its graduates could be examined until the school is again approved, when again examinations could be dispensed with. Ultimate dependence, of course, under this suggestion, is to be placed upon general requirements as to length of course, etc., to reduce the number attending the schools, and the number applying for admission to the bar.

This involves two more matters. Before the organized bar can take this position it must openly acknowledge that there is a problem of overcrowding, and it must keep this problem distinct from the problem of improving legal education. The second matter is to obtain the necessary legal sanctions which will be binding both on the schools and on the students. It seems that conditions are such that we are forced to notice the first matter. And granting that there will be difficulties with the second, and that it will not be easy to secure legislative or other necessary sanctions, it is also certain that we will find no adequate solution to the problem of an overcrowded bar until those difficulties are overcome. There is also this saving feature: To get legal authority for high requirements, the bar will have to demonstrate to the local lawmaking bodies that those requirements are necessary. If those bodies are once satisfied, however, that they are necessary, that state is from that time onward protected from an influx, either from local schools, or from those outside the state. On the other hand, if the requirements of the local jurisdiction are such that such barriers are not necessary, it will be practically impossible to obtain legal sanction for the barriers. It seems inconceivable that monopoly simply for monopoly's sake will be permitted.

Thus each state is made the judge of its local situation and its local needs. No outside interference will be necessary. When, however, those needs are determined, a suitable scale can be set to meet them by a rule of positive law which will eliminate the present necessity for relying on the indirect methods of depending either on the schools or on the examiners.

The sole remaining question is, "Are we convinced that the public welfare demands a limitation on the number of students admitted to the bar?" And if we are convinced, ourselves, we can convince the legislatures. And when we convince the legislatures—or the courts where they control admission—we will make a direct attack on a problem that needs a remedy, and we will have started

on the only possible path that leads to an adequate solution. We have tried publicity, and holding out rating to schools, and high percentages of failures on bar examinations. We have in short tried all but the *direct* solution of the problem.

Is it not time now to face the problem squarely, admit, if the evidence warrants it, that bar limitation is necessary, and proceed to a direct solution, divorcing our contentions if necessary, from any separate and distinct problems as to improving educational requirements for legal practice, and placing our demand on the frank and open ground that the welfare of the profession, and the welfare of the general public require not only a course of adequate legal training but a limitation upon the numbers who are to take that course? Is it time to take a second step? The first step has led to improvement in the schools. There still remains the question of overcrowding.

### The Utah State Bar Organization Act

The Act provides for compulsory membership in the State Bar and includes as its original membership all persons now admitted to practice law in the State. The government of the Bar is vested in a Board of Commissioners, seven in number, elected from seven divisions of the State, which divisions correspond approximately to the different judicial districts of the State. Members of the Bar elect Commissioners from each of the divisions for a term of three years, except the Commissioners first elected who hold office for one, two and three years respectively, as determined by lot. The Board of Commissioners from its members elect a President and Vice-President of the Bar and a Secretary, who may or may not be a Commissioner. Annual fees of \$5.00 are paid into the State Treasury to be paid out only on certification of the commissioners for State Bar purposes.

The authority conferred upon the Board of Commissioners divides itself into three general subjects, viz: the promulgation of rules governing admission to the practice of law both by examination and by reciprocity; the promulgation of rules governing the conduct of members and having to do with disciplinary action against members and with the prosecution of all persons unlawfully practicing law; the power upon request of the Legislature, Governor or Supreme Court, to investigate questions of jurisprudence, matters relating to the courts of this State, practice and procedure therein, practice of the law and the administration of justice. All rules recommended by the Board of Commissioners must be approved by the Supreme Court.

Under the first power it is assumed that, as conditions warrant, the standard of admission to practice by examination will be elevated and the requirements for admission by reciprocity will be so fixed as to insure a thorough knowledge of the applicant's antecedents before admission. Under the second power it is believed that the fund available to the Commissioners will permit investigation and prosecutions that will substantially improve the standard of ethics of the profession; while under the third power substantial benefit, it is believed, can be rendered to the State by the Bar in pointing out defects in practice and procedure that now exist.

## JUDICIAL TECHNIQUE

Eighteenth Century "Fundamentalist" Conception of the Law and of the Function of the Judge in Applying It—Reaction to Certain Extreme Views of Judicial Technique of Today—A Working Compromise—A Practical Aspect of the "Realistic" Theory

BY CHESTER ROHRlich

Member of the New York City Bar

JUDGES are men. That fact went almost unnoticed in the eighteenth and nineteenth centuries. Today it is the major theme of discussions of the judicial process. The pendulum has swung.

It is impossible to comprehend the nature of this revolution without at least a glance at the whole field of legal theory.

The common-law was the result of many influences. The Germanic tribes contributed the notion of a law consisting of customs, *mores*, which bound the sovereign as well as the citizen and which could not be changed; in that static Gallic culture every perceptible change was regarded as an evil deviation from the good old ways. From Aristotle came the philosophical justification for the "supremacy of law," and by King John in Magna Charta it was given civil recognition. For many years it was doubted whether even Parliament could "legally" change the common-law which "possessed the mysterious sanctity of prescription" and was "invested with a halo of dignity peculiar to the embodiment of the deepest principles and to the highest expression of human reason and of the law of nature implanted by God in the heart of man."

The same intellectual revolt against leaving man subject to unpredictable, unavoidable, fortuitous occurrences which in the seventeenth and eighteenth centuries resulted in the formulation of the great rules governing the physical world, gave added impetus to the formulation of rules of law intended to protect man against capricious governments and to make social life predictable and certain. In the formulation of its principles and in the development of the method of their application, English law borrowed heavily from the ancient Roman jurists who, "by means of a subtle dialectic learned from the Greek rhetoricians, organized and classified the means by which every legal problem could be brought to a solution and thus created a sort of written reason satisfying to the mind and the sense of equity." Logic became the instrument of the judge. The process of coordination continued until early in the eighteenth century when by the definite acceptance of the doctrine of *stare decisis* the common-law achieved all the characteristics which distinguish it.

It had definitely become a system of rules. The "rules" were there. The law exists before judicial decisions. It was the function of the judge to find the appropriate rule and to enunciate it. He found it in the decisions of his predecessors. The applicable rule became the major premise of the judge's syllogism. The facts, the minor premise. And thus by a mechanical logic the correct decision

was produced. The judge did not "make" any law. It was all impersonal. Each lawsuit could have only one possible "correct" result. Everyone sufficiently learned in the law who knew the facts could reach the same decision if he "only did his sums correctly." To enable his successors to adhere to the doctrine of *stare decisis* by which all good judges were bound, the judge would write an opinion—the written report of his exercise in logic, setting forth the governing rules quoted from authorities cited to show learning and research, the facts of the case and the inevitable conclusion. Obviously under such a system of "phonographic" judgment any consideration of the judge's personality was utterly irrelevant. Common-law judges were not oriental cadis empowered to make law, to exercise discretion or to decide contrary to "law." This "fundamentalist" view of the law found brief summation in the cliché "a government by law, not men."

A reaction was bound to set in. The humorist who referred to the Supreme Court as "the court of last conjecture" well caught the new spirit. The continental jurists discussed "free judicial decisions." Our own Judge Holmes called attention to the considerations of public policy and social advantage that were necessarily involved in decisions of constitutional questions. Pragmatism became the American philosophy. The old accepted rules of physics and mathematics were subjected to experiments and doubted. There came relativity, the quantum theory, the second law of thermodynamics. Sociologists called attention to the changes in civilization wrought by technological improvements and remarked on the need of a changing law for a changing civilization. Psychologists brought forth "rationalization" and psychoanalysis with its emphasis on unconscious determinants of conduct. In all fields, quite suddenly, rules lost their finality, certainty gave way to doubt, predictability to probability, stability to change and "reasons" became excuses. As the culmination of these trends, within and without the law, we have the legal "realists."

Where the "old law" was predictable, the "new" is unknowable. There is no certainty in life nor in law, proclaim the realists. The notion that certainty and predictability are necessary for an ordered society they declare to be an illusion. We have neither, and yet men carry on their affairs. Judges make law! Always have! It is inevitable that they should for the facts of today's case are necessarily unlike previous cases. Nor are the social needs of today the same as they were yesterday or will be tomorrow. Principles and statutes are not self-executing. Law is not rules. Law is the de-

cision of a particular controversy between certain persons on special facts, no more no less. Judges do not decide cases according to rules, but according to "hunch." The "hunch" is in turn the result of his heredity, environment, training (which includes the legal principles which he has learned), health, previous experiences, emotional make-up, and all those innumerable factors that make the man. It is only after he has decided the case that the judge turns to precedents (and precedents there are, say the realists, to support any desired result), and by choosing wisely finds support for his conclusion. Whenever necessary the "facts" are handled so as to make them fit a chosen precedent or rule. The opinion which follows is the judge's apologia, only that "rationalization" with which psychology has made us familiar and not the true record of the motives, methods or reasons which actually produced the decision.

The views which we have thus attempted briefly to indicate are obviously the more radical ones. Between the extremes of the "old" and the "new" (not necessarily chronologically speaking) there are the "compromisers" (no slur intended—for the truth may lie between the two extremes, not in a philosophical theory, complete and logical and flawless but in some compromise that on the whole works well). They admit the lack of absolute certainty but stress the existence of some predictability and the value of certainty as an ideal. They grant that judges make law—"interstitially"—emphasizing the limitations upon judicial legislation. Admitting the lack of self-executing rules they call attention to the existence of legal "concepts" which sharply limit the freedom of the judge to follow his "hunch." Precedents may not be controlling in an absolute sense, they say, but neither are they without very substantial influence. New cases may not be identical with old ones, but they have striking resemblances. Judicial opinions are not in that *ad hoc* state where like the mule they have "no pride of ancestry nor hope of posterity."

Although any discussion of the merits of these different schools of legal theory would carry us beyond the limits of this paper, it seems proper to advert to one practical aspect of "realism."

There is danger in its acceptance by judges.

Even though the syllogistic logic of the traditional judicial opinion is not a completely adequate method of truthfully recording the real motives and reasons which produced the decision, it has, nevertheless, a proper, important and, on the whole, salubrious place in the judicial process. It may not indicate fully the possible alternative principles which the judge discarded. Nor does it generally give expression to those influences that "are always in the case but never in the record." Its limitations are fairly obvious. Logic is not all of the law nor of judging. It is the method, not the material, of thought. Recognition of the fact that logic is not the only instrument which the judge needs should not cause him to abandon it. Within its proper field it has tremendous value. It compels the judge to express the controlling factors of a litigation in universal terms, thus obligating him to look backwards and forwards beyond the immediate parties to the controversy and the hot passions of the moment. This generalized point of view that places a decision in the perspective of having been caused by

the necessity of adherence to principle and as itself being a mold of future decisions seems to be wholly desirable and salutary. The mere need to talk in terms of rules prevents any very great caprice. There is a limit beyond which even pliant "facts" may not be bent, and so, at any rate, when such a point is reached the principle first chosen must yield to one more given to expression with the particular facts. While all this may be mere rationalization which does not change the strong compelling reasons which produce a decision, it does tend to reduce the influence of those factors which dare not be written down. And there are results—at times vehemently desired—which cannot even be rationalized. A technique which at least makes patent such cases should not be hastily discarded. The syllogism may not be the judge, but it is invaluable as an "auditor and accountant-general."

The realists—even those of the most advanced school—admit as much, some more grudgingly than others, but it takes analysis to unearth the concession. Their writings create the general impression that they deny all value to logic and general principles. This is due to the crusading spirit with which the more prolific writers are imbued. The result is that the charges against the "fundamentalist" conception attract attention while the admissions of merit which they accord some of the old views are lost sight of in the exciting battle of words over the contentious subjects.

We began by noting that judges are men. As such there is danger that they, too, may accept the startling truths without leaving room for the qualifications and reservations which the scholars acknowledge. The convert is not infrequently more wholehearted than the prophet. Especially great is the danger when the new gospel offers an easy and lazy way of life. Nay more, makes it respectable and philosophically correct. To appear logical and speak in terms of rules, and be conscious of the importance of every decision in the law-stream is not easy. It takes time and effort. How much easier to say simply, "I decide so and so because I have a hunch that that is the best way to decide this case. Why waste time and pretend that men are rational when psychology says they are not. Why fret about principles and certainty when my *dirit* is the law. Let's forget yesterday, tomorrow will take care of itself." It may be a long while before crude pragmatism permeates the judiciary. Even when it does its language will not be as blunt as this homely illustration. It will be only a thing of the spirit. A lapse from tradition may be betrayed by nothing more definite than an introductory clause such as, "Even if this opinion meets with a cold reception in the Appellate Courts." It takes a great judge to know that "they do things better with logarithms, that the law is not an exact science, and that exactness may be impossible" and yet be able to say:

"This is not enough to cause the mind to acquiesce in a predestined incoherence. Jurisprudence will be the gainer in the long run by fanning the fires of mental insurrection instead of smothering them with platitudes. So I keep reaching out and groping for a pathway to the light. The outlet may not be found. At least there may be glimmerings that will deny themselves to a craven *non possumus*, the sterility of ignoble ease."

For the present our judges can do worse than joining with the Chief Judge of the New York Court of Appeals in forswearing ignoble ease.

# ARRANGEMENTS FOR FIFTY-FOURTH ANNUAL MEETING

To Be Held at Atlantic City, N. J., on Thursday, Friday and Saturday, September 17, 18 and 19, 1931

**H** EADQUARTERS: Atlantic City Municipal Auditorium. This auditorium is the finest building of its kind in the United States. It will be used for general headquarters purposes, including registration, meetings of Sections and Committees, and for the general sessions of the Association.

Section meetings will be held on Tuesday and Wednesday, September 15 and 16. Further announcement will be made in a later issue of the JOURNAL.

Because of the excellent facilities afforded by the auditorium, headquarters will not be maintained at any hotel. Arrangements have been made with the Atlantic City hotels to provide adequate accommodations for the members of the Association who will attend the meeting. Reservations in hotels listed will be made as usual through the Association's office. Requests should be addressed to the Executive Secretary, 1140 North Dearborn street, Chicago, Illinois. The following accommodations are available:

BOARDWALK HOTELS	RATES BY THE DAY			
		Rooms with Private Bath		
		For 1 Person		For 2 Persons
Chalfonte-Haddon Hall....	A	\$ 9.00 to \$12.00	\$16.00 to \$22.00	
	E	4.00 to 8.00	7.00 to 10.00	
Ambassador .....	E	5.00 to 10.00	8.00 to 12.00	
Traymore .....	A	10.00 to 20.00	16.00 to 26.00	
	E	6.00 to 16.00	8.00 to 18.00	
Marlborough-Blenheim ....	A	10.00 to 14.00	16.00 to 28.00	
	E	6.00 to 10.00	8.00 to 20.00	
Dennis .....	A	...	14.00 to 18.00	
President .....	A	7.00	12.00	...
	E	4.00	6.00	...
Ritz-Carlton .....	E	5.00 to 8.00	7.00 to 16.00	
Shelburne .....	E	5.00 to 7.00	8.00 to 12.00	
Brighton .....	A	8.00 to 12.00	16.00 to 24.00	
	E	5.00 to 9.00	10.00 to 18.00	
Knickerbocker .....	A	8.00 to 12.00	12.00 to 18.00	
	E	4.00 to 8.00	6.00 to 10.00	
Chelsea .....	A	8.00 to 11.00	16.00 to 20.00	
	E	5.00 to 7.00	8.00 to 12.00	
New Belmont .....	E	4.00 to 7.00	5.00 to 8.00	
Apollo .....	E	3.50 to 5.00	6.50 to 10.00	

AVENUE HOTELS		RATES BY THE DAY	
		Rooms with Private Bath For 1 Person	For 2 Persons
Morton .....	A	\$ 7.00 to \$ 9.00	\$12.00 to \$15.00
Colton Manor .....	A	...	12.00 to 15.00
	E	...	6.00 to 9.00
Madison .....	A	5.00	15.00 to 16.00
	E	5.00	9.00 to 10.00
Ludy .....	A	6.00 to 10.00	9.00 to 16.00
	E	4.00 to 7.00	5.00 to 9.00
Galen Hall .....	A	7.00 to 9.00	12.00 to 16.00
Craig Hall .....	A	7.50 to 9.00	11.50 to 13.00
	E	3.50 to 4.50	4.50 to 5.50
Jefferson .....	A	6.00 to 8.00	12.00 to 14.00
	E	3.50 to 5.00	7.00 to 9.00

Raleigh .....	A	6.00 to 7.00	12.00 to 14.00
	E	3.50 to 4.00	5.00 to 6.00
Flanders .....	A	6.00 to 7.00	10.00 to 12.00
Wiltshire .....	A	6.50 to 7.50	11.00 to 14.00
	E	4.00 to 5.50	5.00 to 7.00
Plaza .....	A	5.00 to 6.00	10.00 to 11.00
	E	3.00 to 4.00	5.00 to 6.00
Stanton .....	A	...	10.00 to 12.00
Penn-Atlantic .....	E	3.50 to 4.00	6.00 to 7.00
Elberon .....	E	4.00 to 6.00	6.00 to 9.00
Kentucky .....	E	2.50 to 3.00	4.50 to 5.50
Glaslyn-Chatham .....	A	6.00	12.00
Arlington .....	A	6.00 to 8.00	10.00 to 12.00
	E	4.00 to 6.00	6.00 to 8.00
Monticello .....	A	6.00 to 7.00	11.00 to 12.00
	E	3.50 to 4.00	5.00 to 6.00
Lafayette .....	A	7.00 to 8.00	12.00 to 14.00
	E	3.50 to 4.00	6.00 to 7.00
Thurber .....	E	...	2.50
Franklin .....	E	3.00 to 3.50	6.00 to 7.00
Grossman's .....	A	9.00 to 11.00	16.00 to 18.00
Sterling .....	A	6.00 to 8.00	12.00 to 14.00
	E	3.50 to 6.00	5.00 to 8.00
New Richmond .....	E	3.50 to 4.00	5.00 to 6.00
Devonshire .....	A	6.00 to 7.00	11.00 to 12.00
	E	3.50 to 4.00	5.00 to 6.00
Eastbourne .....	A	...	12.00 to 14.00
	E	4.00	6.00 to 7.00
Clarendon .....	A	6.00 to 7.00	11.00 to 12.00
	E	3.50 to 5.00	6.00 to 7.00
Gerstel's Leland .....	A	6.50 to 7.00	13.00 to 14.00
	E	3.00 to 5.00	5.00 to 7.00
Cheltenham-Revere .....	A	6.00	12.00
	E	2.50	5.00
Carolina Crest (Continental Plan) .....		4.00 to 5.00	8.00 to 10.00
Continental .....	E	4.00 to 6.00	7.00 to 8.00
Maples .....	E	...	5.00 to 6.00
Grand Atlantic .....	A	5.50 to 6.50	11.00 to 12.00
	E	3.00 to 4.00	6.00 to 7.00
Trexler .....	A	5.00	9.00 to 10.00
	E	3.00	4.00 to 5.00
Delaware City .....	E	3.00 to 4.00	4.00 to 5.00
Louvan .....	E	...	7.00

NOTE: In the list of hotels A stands for the American Plan (with meals), E for the European Plan (without meals).

In addition to the above hotel rooms, all with bath, there are available rooms without bath, which rooms will be reserved on request. Rates are, of course, somewhat lower on rooms without bath.

To avoid unnecessary correspondence, members are urgently requested to be specific in making requests for reservations, stating hotel desired, number of rooms required, names of persons who will occupy the same, rate, whether European or American plan, and arrival date, including definite information as to whether such arrival will be in the morning or evening.

Reservations should be made as early as possible.



**National Conference of Commissioners on Uniform State Laws, to Be Held at Hotel Haddon Hall, September 8-14, 1931**

The Conference will be held in Atlantic City, September 8-14, 1931. The sessions will be held at Chalfonte-Haddon Hall, where headquarters will be maintained beginning Tuesday, September 8th. Applications for hotel reservations should be made to the Executive Secretary of the American Bar Association, 1140 North Dearborn Street, Chicago, Illinois.

**Comparative Law Bureau to Feature Its Latest Publication**

At its meeting in Atlantic City, in connection with the Annual Meeting of the American Bar Association, the Comparative Law Bureau will make a special feature of the publication of the Scott translation of *Las Siete Partidas*. This enterprise was undertaken several years ago, but publication has been delayed for various reasons. It has now been carried out, however, with the generous assistance of Mr. Kix Miller of the Commerce Clearing House of Chicago, and he will have a supply of the books on hand in its several bindings at Atlantic City.

Other features of the Comparative Law Bureau meeting will be a talk by Mr. John Vance of the staff of the Congressional Library on the bibliography of this Spanish Code. Mr. Vance will bring the various texts of the Code which have been collected by the Congressional Library. Mr. Henry P. Dart of New Orleans will deliver an address on the influences of *Las Siete Partidas* on Louisiana law.

By this special program the Comparative Law Bureau hopes to make the Bar acquainted with this latest publication of the section.

**Binder for Journal**

The Journal is prepared to furnish a Binder to those who wish to preserve current or back numbers, at a price of \$1.50, postage paid. This represents merely the manufacturer's cost plus expense of packing, shipping, carriage, etc. The Binder presents a handsome appearance and is well made and serviceable. Please send check with order to the Journal office.

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CHICAGO, ILL.

# NEWS OF STATE AND LOCAL BAR ASSOCIATIONS

## Arkansas



HARRY P. DAILY  
President, Bar Association of Arkansas

### Bar Association of Arkansas Meets

The Thirty-fourth Annual Meeting of the Bar Association of Arkansas was held at Hot Springs, on May 21 and 22. The invocation was delivered by the Rev. Marion A. Boggs, and the address of welcome by Richard M. Ryan, both of Hot Springs. The response was by C. R. Barry. President Trimble's address was on "The Legal Profession." The other principal address on the program was by Senator Caraway.

A large part of the program was devoted to a symposium on State Government, six general subjects being discussed in a formal address, followed by a general discussion under the conduct of a leader. The symposium was introduced by a statement of its outline and purpose by J. H. Carmichael. S. H. Mann then spoke on the question "New Constitution or Amendments—The Remedy," and the discussion following was led by C. A. Walls. J. E. Martineau then spoke on the "Executive Department," and Mr. Hamilton Moses led the discussion which followed. DuVal L. Purkins spoke on the "Legislative Department," and Mr. Horace Chamberlin led the discussion. Mr. Dwight L. Savage spoke on "Taxation," and Mr. W. H. Rector led the discussion. Mr. Sam Rorex spoke on Accountancy and Bookkeeping and Mr. Harry P. Daily led the discussion. The symposium was concluded with an address by Judge R. M. Mann on "County and City Government," and Mr. Charles D. Frierson leading the discussion which followed.

There is to be another meeting of the Association before the legislature convenes again and the matters discussed above will doubtless be put in a more

concrete form for presentation to that body.

Mr. Harry P. Daily, formerly Vice-President, was elected President and Mr. George A. McConnell, of Little Rock, was elected Vice-President. Mr. Roscoe R. Lynn was re-elected Secretary. Mr. Lynn has held this position continuously since 1900. Previous to that he was Assistant Secretary for four years.

The banquet was a very enjoyable affair, Mr. T. S. Buzbee, of Little Rock, presiding as toastmaster. Talks were made by Mr. L. R. Southmayd, of Eldorado, on the "Rule in Shelley's Case;" by Brooks Hays, of Little Rock, on "First . . . Kill All the Lawyers;" by Mr. B. E. Carter, of Texarkana, on "Time;" by Judge Turner Butler of Little Rock on "Leading Cases;" by Mr. N. A. Gibson, of Tulsa, Oklahoma, on "Lawyers and Their Problems."

ROS COE R. LYNN, Secretary.

## Georgia

### Georgia Bar Approves Bill Defining and Regulating Practice of Law

The 1931 Session of the Georgia Bar Association convened at Savannah on May 28th, 29th, and 30th. This session was presided over by A. W. Cozart, President, of Columbus.

The annual address was delivered by the Honorable Charles A. Boston, President of the American Bar Association, whose subject was "The Lawyer, the Layman, and the Law." Other addresses were delivered by Judge Samuel B. Adams of Savannah on "Chief Justice Roger B. Taney;" by Judge Alex W. Stephens of the Court of Appeals of Georgia on "Constitutional Conventions;" by Judge Hiram Warner Hill of the Supreme Court of Georgia on "The Work of the Supreme Court of Georgia;" and by Mr. Robert Strickland, Jr. of Atlanta on "Banking and the Legal Profession."

The principal business before the Association was the consideration of the report of the Special Committee on the Practice of Law by Lay Interests. Recently the Supreme Court of Georgia, in the case of Atlanta Title & Trust Company v. Boykin, Solicitor General, etc., 157 S. E. 455, held that the statutory restrictions on the practice of law in Georgia related only to appearances in court, and the situation thereby created in Georgia is a grave one. This special committee was composed of W. G. Grant of Atlanta, A. C. Wheeler of Gainesville, and Miles W. Lewis of Greensboro.

The Association, after a lengthy discussion, gave its approval to a Bill defining and regulating the practice of law in Georgia, to be offered at the approaching session of the General Assembly of the State.

The attendance at the sessions was probably the largest in recent years.

The following officers were elected: Hatton Lovejoy, LaGrange, President; Lawrence S. Camp, Fairburn, First Vice President; Logan Bleckley, Atlanta,

Treasurer; H. F. Lawson, Hawkinsville, Secretary.

Executive Committee: David S. Atkinson, Savannah, Chairman; W. W. Mundy, Cedartown; Erwin Sibley, Milledgeville; John L. Tye, Jr., Atlanta.

H. F. LAWSON, Secretary.

## Illinois

### The Illinois State Bar Association Holds Fifty-fifth Annual Meeting

The fifty-fifth annual meeting of the Illinois State Bar Association was held in Peoria on May twenty-eighth, and twenty-ninth, 1931. The annual address of the President, Clarence W. Heyl, was upon "The Responsibility of the Bar and the Improvement of the Law," an excellent portrayal of the current movement of the Bar toward the assumption of the responsibility in improving legal practice and procedure.

The Committee reports showed a commendable activity on the part of all Committeemen. Particularly the Committees on Legislation, Legal Education, Local Bar Organization and Office Management, revealed new methods in Bar Association work.

The Organization Committee, with Professor O. L. McCaskill of Urbana as Chairman, had sent a circular letter to each Local Bar Association every month with five suggestions of different forms of Bar Association activity which might be used by the Local Associations.

The Committee on Legislation, Thurlow G. Essington of Chicago, Chairman, has been sending each Local Bar Association a syllabus of bills pending before the Legislature each two weeks, so that the organized Bar may keep advised of legislative developments. A number of Local Bar Associations have availed themselves of this service by holding regular meetings to discuss this legislation.

Paul O'Donnell of Chicago, Chairman of the Legal Education Committee, reported that his Committee last summer arranged for over forty freshmen of Illinois law schools to work in law offices and this year the number of offices has increased to over seventy-five, who will give law school freshmen three months of practical experience during their summer vacation. This feature is proving to be of inestimable value to the students. As one wrote: "In my freshman year I had a hard time to understand what it was all about, but after three months in that law office I now see where every day's lesson fits in the picture of my legal education."

The Committee on Office Management under the leadership of George H. Webb of Springfield has completely revised the Illinois office management manual, and adjusted it to different types of offices, so that whether the reader operates a one-man or fifty-man office he will find ideas of value in this manual. Copies of it may be obtained at the Secretary's office at Springfield for two dollars each.

Thursday afternoon was devoted to



AMOS C. MILLER  
President, Illinois State Bar Association

entertainment and most of the members and guests played in the golf tournament at Mt. Hawley Country Club, after which the Peoria Bar Association proved themselves real hosts by giving a complimentary dinner to all at the Club. This was followed by a reception and dance at the Pere Marquette Hotel.

Friday was discussion day and the meeting commenced with a scholarly address upon the subject, "Theory, Experience, Experimentation," by Dean Albert J. Harno of the University of Illinois Law School. Senator Florence Fifer Bohrer of Bloomington followed by an interesting and instructive talk upon "Legal Status of Women in Illinois." The morning session was closed by an address by Dean Paul V. McNutt of the Indiana University Law School upon "The Triumvirate of the Law," which stirred Illinois lawyers as they have not been moved for some time. The effect of Dean McNutt's address will be re-echoed in Illinois for years to come.

Friday afternoon was devoted to a meeting of the delegates of Local Bar Associations and over fifty Local Bar Associations were represented. Henry I. Green of Urbana led off the discussion with an excellent address upon "Present Day Duty of the Illinois Lawyer," stressing the evils of the primary system and pleading for the return of the representative form of government. State's Attorney John A. Swanson of Chicago then gave an address upon the "Progress and Administration of Criminal Law," in which he gave a picture of the operation of the State's Attorney's office of Cook County ending with a plea for the support of the Bar in the efforts of the State's Attorneys of Illinois to enforce our criminal law.

State Senator Andrew S. Cuthbertson of Bunker Hill, Chairman of the Illinois Judicial Advisory Council, then took the floor to lead a discussion on the work of the Council and aid expected by it of local bar associations. Under his leadership Gilson Brown, President of the Alton Bar Association; A. G. Harris, President of the Lee County Bar Association;

Albert Huber, President of the Rock Island County Bar Association; William G. Wermuth, Chairman of the Amendment of the Law Committee of the Chicago Bar Association, and Oscar R. Zipf, President of the Stephenson County Bar Association, gave the views of their respective organizations on what the lawyers of Illinois expect of the Judicial Advisory Council. The symposium proving to be very fruitful of suggestions looking toward the improvement in the practice of the law.

The meeting closed with the Annual Dinner at the Pere Marquette Hotel where the speaker of the evening, Honorable Royal A. Stone, Justice of the Supreme Court of Minnesota, spoke upon "The Status of the Legal Profession as an Agency of Service," and sent the members of the Illinois Bar back to their homes with renewed determination to furnish the best of legal service to their clients.

Any member of the Illinois State Bar Association desiring to be a candidate for office may do so by filing his nomination petition with the Secretary thirty days before the meeting and election is by mail. The results this year were the election of the following: President, Amos C. Miller, Chicago; Vice Presidents, June C. Smith, Centralia; R. V. Fletcher, Chicago; James S. Baldwin, Decatur; Secretary, R. Allan Stephens, Springfield; Treasurer, Frank L. Trutter, Springfield; Board of Governors (for three-year term), John F. Voigt, Chicago; Howard P. Castle, Chicago.

In addition to the election of State officers this year for the first time advantage was taken of the resolution adopted by the Board of Governors of the Illinois State Bar Association providing for an advisory vote for a member of the General Council, Vice President and members of the Local Council of the American Bar Association. As a result five hundred and thirty-nine members of the American Bar Association who are members of the Illinois State Bar Association will recommend to the members who will assemble at Atlantic City, that they nominate Edward W. Everett of Chicago as the Illinois member of the General Council. This is probably the largest number of members of the American Bar Association ever participating in nominating a member of the General Council. The votes were cast by the individual member in his own office and, therefore, reflects the judgment of this large group of Illinois members, instead of the few who may be able to find the place assigned for their meeting at the American Bar Association session.

R. ALLAN STEPHENS, Secretary.

## Kansas

### Kansas Bar Association Holds Forty-ninth Annual Meeting

The Forty-ninth Annual Meeting of the Bar Association of the State of Kansas was held in Wichita on May 22nd and 23rd. On Friday morning President Benj. F. Hegler delivered the annual President's address. The subject was "The Lawyers' Debt to Society and How It Has Been Paid."

The report of the Committee on Local Bar Associations showed that at the



B. I. LITOWICH  
President, Kansas Bar Association

present time local bar associations have been organized and are active in practically every judicial district in the state.

The Committee on Judicial Salaries reported that although the Committee at the recent session of the Legislature has endeavored to secure the passage of a bill increasing judicial salaries, yet because of general conditions and the temper of that body in cutting all appropriations as low as possible, it was not deemed expedient to push the bill at this time, and the matter was held over until the next session.

One of the most interesting addresses made at the meeting was that delivered by Mr. J. C. Shearman, the subject being "Identification of Questioned Documents." Mr. Shearman is one of the leading handwriting experts in the United States and his address undoubtedly was of great interest to all members of the bar who come in contact with this problem at some time in their practice.

Two questions which were discussed at length, but upon which the Association took no definite action, were, first, whether the Clerks of the District Court should be appointed by the District Judges or elected as they are at the present time, and second, whether efforts should be made to have a District Attorney in each judicial district to handle the criminal trial business assisted by the County Attorney of the proper county.

On Friday evening, Hon. James A. Veasey of Tulsa, Oklahoma, was to deliver an address on the "Predicament of the Petroleum Industry in Its Practical and Legal Aspects." On account of the present situation in the oil industry which is of vital import to the citizens of Kansas on account of this state being one of the leading oil producing states, his address was looked forward to with a great deal of interest. Unfortunately, however, Mr. Veasey, after his introductory remarks, was forced to discontinue his address due to illness.

During the Saturday session Mr.

Harry Hart delivered an address on the "Unfair Practices of the Law by Laymen." This matter invoked probably more discussion than any other feature of the meeting and resulted in the appointment of a Committee to study this matter and make recommendations for future action by the Association.

It was also voted to have the incoming president appoint a Committee to again bring before the Association the question of the incorporation of the Bar. This matter had previously been before the Association and was turned down. However, because those states which have adopted the idea are apparently finding it a success, it was deemed advisable to again bring the matter before the next meeting for further consideration.

The program of the Annual Banquet was a decided success. The speakers were Hon. Karl Miller, Judge of the Thirty-first Judicial District of Kansas, Hon. Victor Murdock, former Congressman from Kansas, and former member of the Federal Trade Commission, and Hon. E. S. Vaught, Judge of the United States District Court for the Western District of Oklahoma.

Nearly 500 members of the bar were in attendance at the meeting. Officers were elected for the ensuing year as follows: B. I. Litowich, Salina, President; Gilbert H. Frith, Emporia, Vice President; W. E. Stanley, Wichita, Secretary; James G. Norton, Wichita, Treasurer.

W. E. STANLEY, Secretary.

## South Carolina

### South Carolina Bar Holds Annual Meeting at Charleston

The twenty-eighth annual meeting of the South Carolina Bar Association was held at Charleston on April 23 and 24. One of the main features of the sessions

was an address by Hon. Albert C. Ritchie, Governor of Maryland. A convention of justices of the supreme court and circuit judges was held in connection with the meeting.

Several able reports were made, among them that of the Committee on Judicial Reform and Remedial Law. The Committee on the American Law Institute's criminal code held a lengthy session, which was attended by Dean W. E. Mikell and Prof. Keedy of the University of Pennsylvania Law School. These gentlemen, who are reporters for the Criminal Code for the Institute, rendered valuable assistance to the committee.

The following officers were elected: President, John I. Cosgrove; Executive Secretary and Treasurer, John M. Cantey, Jr.; Executive Committee, Ashley C. Tobias, Jr., chairman; F. William Cappellman and P. L. Cain; Vice-Presidents: first circuit, Legaré Walker; second, John E. Stansfield; third, R. D. Epps; fourth, J. E. Leppard; fifth, C. B. Elliott; sixth, John M. Hemphill; seventh, G. W. Speer; eighth, M. G. McDonald; ninth, A. T. Smythe; tenth, Broadus Thompson; eleventh, J. W. Thurmond; twelfth, M. A. Wright; thirteenth, James H. Price; fourteenth, R. M. Murdaugh.

The following were chosen General Counsel for the above circuits in the order named: Marin Gressette, T. M. Boulware, T. H. Stukes, D. Carl Cook, C. T. Graydon, W. D. Douglas, C. E. Daniel, W. H. Nicholson, G. S. B. Rivers, O. H. Doyle, B. W. Crouch, J. P. McNeil, W. H. Earle, J. M. Moore.

The following Local Counsel were elected, two for each of the above circuits, in the order named: J. L. Duke, Pike Berry; J. W. Crum, F. W. Toole; H. C. Jennings, F. R. Hemingway; G. C. McLaurin, Geo. W. Freeman; E. W. Mullins, D. W. Robinson, Jr.; D. A. Gaston, R. B. Hilderbrand; J. G. Hughes, S. T. Lanham; John Nickles, Douglas Featherstone; E. K. Pritchard, Geo. L. Buist; R. T. Jaynes, Wade C. Hughes; E. L. Asbill, J. D. Carroll; M. C. Woods, Jr., W. S. Houck; J. L. Plyler, J. D. Poage; J. H. Jenkins, R. P. Searson.

JOHN M. CANTEY, JR., Secretary.

## Virginia

### Governor Ritchie to Address Virginia Bar Meeting

Governor Albert C. Ritchie, of Maryland, will give the annual address at the Virginia State Bar Association meeting, to be held at the Greenbrier Hotel, White Sulphur Springs, West Virginia, July 30th-31st, and August 1st, 1931.

Governor Ritchie will be introduced by Governor John Garland Pollard of Virginia, and Governor William G. Conley of West Virginia will introduce Governor Pollard.

The program for the night of the annual address will be somewhat unique in that the program will include the Governors of the States of Maryland, Virginia, and West Virginia.

One of the leading questions to come before the members is discussion of raising standards for admission to the bar. The members are also expected to discuss the increasing of judges' salaries,

to raise the plane of the judiciary and the advisability of retiring judges old in service with a portion of their income as a pension.

## Miscellaneous

The Fifteenth Judicial District (La.) Bar Association, at their recent quarterly meeting, elected the following officers: Dan Debaillon, Lafayette, President; Dennis Canaan, Crowley, first Vice-President; J. E. Kibbe, Abbeville, second Vice-President; Noble Chambers, Crowley (re-elected), Secretary and Treasurer, and Otto Broussard, Abbeville, Executive Committeeman.

A. B. Childress, of Faribault, was chosen President of the Fifth Judicial (Minn.) Bar Association at its annual banquet in May. Other officers chosen at the session were: Vice-President, John Swendiman, of Dodge Center; Secretary, Charles N. Sayles, of Faribault; Treasurer, Otto J. Nelson of Owatonna; County Executive Committeeman, S. R. Nelson, of Owatonna, G. P. Madden of Waseca, Kenneth Myser of Hayfield, and John Le Crone of Faribault.

Elmer L. Brock was elected President of the Denver (Col.) Bar Association at a meeting of that organization on May 4th. Other officers are Hamlet J. Barry, Vice-President; Edward G. Knowles, Second Vice-President, and Guy K. Brewster and Ernest B. Fowler, Trustees.

The Muskogee County (Okla.) Bar Association, at its meeting early in May, elected the following officers for the ensuing year: Irwin Donovan, President; M. D. Green, Vice-President; W. K. Zachry, Secretary; and Bert Nussbaum, Treasurer.

Donald D. Harries, of Duluth, was elected President of the Eleventh Judicial District (Minn.) Bar Association at the recent annual meeting of the Association. Other officers chosen are as follows: George W. Atmore, Vice-President; S. W. Gilpin, Treasurer, and Ellis J. Butchart, Secretary. Leonard McHugh and Rolla F. Hunt were named to the Board of Governors.

The following have been elected and have been installed as new officers of the Cleveland Bar Association: President, Walter L. Flory; First Vice-President, A. G. Newcomb; Second Vice-President, H. E. Varga; Third Vice-President, Miss Marie R. Wing; Treasurer, D. J. Needham; members of the Executive Committee: W. T. Dunmore, M. C. Harrison, W. C. Keough, Clifton I. Rust, Carl F. Shuler and Herbert A. Spring.

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